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NOTES.

WE have to repeat our warning that publishers and correspondents who wish their communications to meet with prompt attention *should not send them to Oxford*, especially in vacation time.

As we go to press the House of Lords has given its long delayed judgment in *Allen* v. *Flood* (Dec. 14, appeal from *Flood* v. *Jackson*, '95, 2 Q. B. 21, 64 L. J. Q. B. 665), reversing, though not unanimously, the decision of the Court of Appeal. At present we can only express in the fewest words our conviction that the House of Lords has never deserved better of the Common Law.

It is curious to find that the rule in *Shelley's* case can still afford matter for discussion. Indeed the will considered in *Van Grutten* v. *Foxwell*, '97, A. C. 658, 66 L. J. Q. B. 745, was dated in 1804, and in Lord Davey's opinion, though not in Lord Macnaghten's, pretty badly drawn. In the result, Lord Macnaghten has performed the feat of giving us an exposition of this not very lively subject which is not only readable but entertaining; and the rule stands firm, notwithstanding strenuous assault, as a rule of law which is quite independent of the settlor's intention. If a testator said in so many words, 'The rule in *Shelley's* case shall not apply to any limitations contained in this my will,' it would be merely inoperative. There may be cases where 'heirs' or like words are clearly shown by the immediate context to have an unusual sense which makes them words of designation and not of limitation. Such cases do not form exceptions to the rule, for when a distinct special meaning, ascertained by the special context, is clear to the Court, and is read in the place of the words so qualified, there is nothing to which the rule could apply.

If hard cases make bad law, good law occasionally produces hard cases.

This is the moral which may be drawn from *Russell* v. *Russell*, '97, A. C. 395, 66 L. J. P. 122.

That Lord Russell suffered what was morally a cruel and intolerable outrage at the hands of his wife is certain. Many men would prefer any amount of physical pain to the mental agony caused by a foul and baseless slander. But whether the circulation by a wife of a malignant calumny on her husband which was untrue, and which she did not believe to be true, constitutes such legal cruelty as entitles him to a judicial separation, was, until the judgment of the House of Lords in *Russell* v. *Russell*, a fairly debateable question. The proper answer to it was in fact so uncertain that while five of their lordships have answered it in the negative, four, including the Lord Chancellor, have answered it in the affirmative. We must now, however, take it as the law of England that to constitute the kind of cruelty required to support proceedings for divorce, the conduct of the person charged with cruelty must be such as to involve either danger to life, limb, or health, or a reasonable apprehension of such danger or hurt. To put the matter plainly, the only kind of cruelty which the law of England recognizes as entitling a husband or wife to a judicial separation is physical cruelty, or conduct which causes a legitimate apprehension of physical cruelty. That this conclusion is consistent with the decided cases must be admitted; that it is a necessary result of the decided cases is not so clear. It is, however, probably the safest conclusion at which the House of Lords could arrive. If the law of divorce is to be expanded, such expansion must now be the result of legislative, not of judicial, action. Yet one is tempted to wonder whether the House of Lords in its judicial capacity might not have done the work better as well as sooner.

We pointed out at the time (L. Q. R. xii. 204) that the decision of the majority of the Court of Appeal in *Gaskell* v. *Gosling*, '96, 1 Q. B. 669, 65 L. J. Q. B. 435, was a rather alarming extension of the liability to which people might become subject as undisclosed principals. The dissenting judgment of Rigby L.J. has now been confirmed by the unanimous opinion of the House of Lords: *Gosling* v. *Gaskell*, '97, A. C. 575, 66 L. J. Q. B. 848. The question was shortly this: A receiver having been appointed by trustees for debenture-holders of a company, under the express powers of their deed, and to carry on the business as the agent of the company only, does he become the agent of the trustees, and do they become answer-

able for debts contracted by him, when the company is ordered to be wound up? The final answer in the negative is put on the authority of *Cox* v. *Hickman*, 8 H. L. C. 268. The trustees never gave the receiver any actual authority to pledge their credit, and *Cox* v. *Hickman*, in which the facts were rather less favourable, shows that the business was not and never became their business so as to give him any authority in law.

Perhaps enterprising traders who would like to appropriate the goodwill of their older established rivals will ultimately be convinced by such decisions as that of the House of Lords in *Birmingham Vinegar Brewery Co.* v. *Powell*, '97, A. C. 710, 66 L. J. Ch. 763, founded as they are on the plainest principles of justice, good sense, and good faith in business matters, that honesty is the best policy, and ingenuity spent on deceiving the public is an unprofitable expenditure. But the process seems to take a long time.

The *Perth General Station Committee* v. *Ross*, '97, A. C. 479, 66 L. J. P. C. 81, is a case from Scotland, but it lays down a principle applying to the whole United Kingdom. A railway company have the right to exclude from their stations all persons, except those using or desirous of using the railway, and may impose upon the rest of the public any terms they think proper as the condition of admittance. This right is of course subject to any facilities granted by the Railway Commissioners. This plain statement of law, which is really involved in *Barker* v. *Midland Ry. Co.*, 18 C. B. 46, will commend itself to the common sense of the public. It simply amounts to this: that the property of a railway company, though held for certain public purposes, which must be carried out by the company, is the property of the company. Hence follows the inevitable result that the company can impose upon any one who is not a passenger the conditions on which he may use the railway station or other property of the company. If this power be abused recourse may be had to the Railway Commission, but, subject to the authority of the Railway Commission and to the rights of passengers, the rights of a railway company are those of any other owner of property. The sooner this is understood the better. The oddity of the thing is that one of the plainest of legal principles should have not been apprehended by the Court of Session, and should still fail to obtain the assent of Lord Morris. On the Continent it is quite common to require a special admission ticket (procurable, in Germany, from an automatic machine) to be taken by any one not being a passenger and wishing to go on the

platforms, whether in the capacity of friend, attendant, hotel porter, or otherwise.

The debate on *Sinclair's Divorce Bill*, '97, A. C. 469, raises a curious and important inquiry to which it does not give a reply. The question is in substance this: If the High Court pronounces a decree finally dissolving the marriage of persons whom the Court supposes to be domiciled in England, but who are in fact domiciled in another country, is the divorce invalid? The proceedings with regard to Sinclair's Bill, which was passed by Parliament, suggest that such a divorce is a nullity, for if it were not then the Bill would have been needless. The suggested ground of invalidity is, however, a very serious one, for if it be a good ground, it would seem to follow that if *H*, a husband, is divorced from his wife, *W*, on the unfounded supposition that he was domiciled in England at the time of the divorce, any evidence produced at any time that he was not then domiciled in England may shake the validity of the divorce, and therefore the validity of any subsequent marriage contracted by *H* during the lifetime of *W*, or by *W* during the lifetime of *H*. The further consequence seems logically to ensue that a respondent not domiciled in England cannot by his conduct give the Divorce Court jurisdiction. But if this be so then *Zycklinski* v. *Zycklinski*, 1862, 2 Sw. & Tr. 420, is wrongly decided, and a decision, which though it has been criticized, has been treated as good law for more than thirty years, must be considered as erroneous. It is curious that *Zycklinski* v. *Zycklinski* does not seem to have been cited in the debate on Sinclair's Bill.

We are by no means prepared to say that the decision of the Judicial Committee in *Ex parte Carew*, '97, A. C. 719, 66 L. J. P. C. 95, was wrong, but the very short judgment does not adequately show to our mind that it was right. The question was whether the Crown had power to make rules for the Consular Court in Japan whereby a jury of five tries capital cases. Whether there is such power would seem to depend, first, on the effect of the treaty with Japan under which the Court exists, and which in fact provides for trial and punishment of British subjects being 'according to the laws of Great Britain' (see Hall on Foreign Jurisdiction, p. 149), and next on the effect of the Foreign Jurisdiction Act, 1890, so far as applicable. But their Lordships said not a word about the treaty, and referred only to the repealed Act 6 & 7 Vict. c. 94, identical in substance, for this purpose, with the Act now in force. So the decision is hardly instructive.

Court v. *Berlin*, '97, 2 Q. B. 396, 66 L. J. Q. B. 714, C. A., shows that the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36, does not invalidate the sound principle that dormant partners are liable for all partnership debts contracted with their authority, and that as regards a person, e. g. a solicitor, employed on behalf of the firm, the retirement of partners which is unknown to him does not constitute a revocation of authority. The practical result is that a solicitor who is authorized by a firm to conduct an action, may charge against dormant partners debts duly contracted in the course of the action even after the partners have privately retired, and this though at the moment when he entered into the service of the firm he did not know that such partners were members of it. And it is satisfactory to have one more warning that the Courts will not encourage speculative attempts to read gratuitous alterations of the law into codifying statutes.

But though *Court* v. *Berlin* is decided in accordance with the admitted rules of English law in regard to the liability of an undisclosed principal, it certainly does raise in rather a strong form the question whether these rules are themselves reasonable. *A* enters into the service of *X*, he does not know of the existence of *Y* and *Z*, *X*'s dormant partners. It therefore follows that he was induced to enter into the contract by his trust in the promise of *X* to remunerate him; and if he afterwards discovered that *X* had no partners, *A* would have no reason to complain. Why then should he gain by the fact, which never influenced his conduct, that *Y* and *Z* were *X*'s partners when *A* contracted with *X*? The only reason which can be given is that *Y* and *Z* benefited by *A*'s services; but the whole basis of the law of contract is that it is not the fact that *X*, *Y*, or *Z* have benefited by *A*'s services, but the fact that they have promised *A* to remunerate him for them, which constitutes the contractual liability of *X*, *Y*, or *Z*. The truth is that the whole English law as to the position of undisclosed principals is an anomaly. Whether it be or be not a beneficial anomaly is a question to be decided with reference rather to mercantile than to legal principles.

The Leeds Building Society v. *Mallandaine*, '97, 2 Q. B. 402, 66 L. J. Q. B. 813, C. A., affirms the judgment of the Court below, and, following the *Clerical &c. Society* v. *Carter*, 1889, 22 Q. B. D. 444, determines that interest of money is chargeable with income tax even though it be not profits, and this though the interest is not annual interest. The case carries somewhat further the principle established by the *Clerical &c. Society* v. *Carter*, viz. that interest is

chargeable as such to income tax, and is probably a legitimate extension of that principle. Whether the principle itself is really in accordance with the Income Tax Acts is quite another question, which will sooner or later need to be considered by the House of Lords. It is certain that the general aim of income tax legislation is the taxation of profits, and though the Income Tax Acts, as interpreted by the Courts, give a very wide meaning to the word profits, it is certainly an anomaly that a company or society, after being taxed on the whole of its profits, may also be taxed on interest which it receives.

Edwards v. *Steel, Young & Co.*, '97, 2 Q. B. 327, 66 L. J. Q. B. 690, C. A., simply determines the precise meaning of certain words of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 186, and in substance decides that when the master of a ship has under s. 186, sub-s. (*d*) deposited with a consular officer a sum which is deemed by such officer to be sufficient to defray the expenses of a sailor's maintenance and passage home, the shipowners have discharged all the duties imposed upon them by s. 186. This interpretation of the section is probably sound, but does not raise any point of great interest to any one except sailors. But the case and others like it suggest an inquiry to which nowadays people are loth to give expression. Is it on the whole expedient that any class of grown men should be treated by the state as incompetent to manage their own affairs? Many provisions of the Merchant Shipping Act undoubtedly assume that sailors stand to a certain extent in the position of infants, and that it is for some reason or other desirable that the state should arrange for sailors on merchant ships the terms on which they should contract to serve their employers. The assumption may, for aught we know, be justified by facts, and it is traditional, but it is in itself rather a strange one. There is no very obvious reason why a man whose work it is to steer a ship should have less common sense than a man who is employed in driving a carriage, and if it be said that sailors are proved by experience to be reckless, the reply at any rate lies near at hand that the way to make men careless is to extend to them special protection. It is of course a fact that a sailor dismissed in a foreign country is specially liable to ill-treatment, and this fact provides a good reason for imposing severe penalties on any shipowner who breaks his contract with a sailor in a foreign country, but it does not so obviously vindicate the wisdom of making contracts on a sailor's behalf instead of leaving him, like other adults, to make contracts for himself.

When the Legislature after much conflict of commercial opinion decided to sanction the principle of limited liability, it did its best to secure that the limited capital should be a reality and not a sham, and it required it to be fully paid up; but the question at once arose, what is payment? and the answer which the Court gave was that payment might be payment in cash or in kind. Here was the promoter's opportunity, and he exercised it very freely by foisting all kinds of things, from concessions to cigars, with no certain criterion of value, on unfortunate companies until the Legislature had to intervene and say in the much vexed s. 25 that payment must be payment in cash unless otherwise provided by a contract filed with the Registrar of Joint-Stock Companies. This was a good move in the game, but it was by no means checkmate to the enterprising promoter. The payment must still in theory be payment in full, for s. 25 only applies to the mode of payment, not the amount; but who was to judge of the adequacy of the consideration given? The Court might, it was true, direct an inquiry; but would it? *Re Wragg*, '97, 1 Ch. 796, 66 L. J. Ch. 419, C. A., has answered this question very plainly, and to the secret joy of the promoter, and the answer comes to this—that the Court will not review the directors' judgment in accepting what they think an adequate consideration for the issue of the shares unless the contract itself can be impeached. There is a great deal to be said for this policy of non-intervention. Directors ought to be presumed to be honest and trusted not to betray the interests of the company. Our whole commercial system is based on confidence: take but this trust away, 'untune this string and mark what discord follows.' There is at all events this safeguard, that the filed contract must set out the nature of the consideration. It will not do for it to state it by reference to another contract which is not filed. *Re Kharaskhoma Syndicate*, '97, 2 Ch. 451, 66 L. J. Ch. 675, C. A. Directors thus in effect say to shareholders, 'This is the property which we have accepted for the shares. Judge for yourselves.' They can hardly do more.

Charity covers a multitude of significations as well as sins, and the latest puzzle which the Court has had propounded to it in this connexion is whether a bequest for requiem masses to be celebrated in public for the welfare of the testator's soul is a charity. The grant of a perpetual annuity to a minister to preach a sermon to the memory of the testator has been held a charity; and if a sermon, why not masses? *A. G.* v. *Hall*, '97, 2 I. R. 426, C. A. The only difficulty comes from the element of selfishness in the bequest, but really motive is immaterial except to the testator's destiny

elsewhere. If motives were regarded much almsgiving, it is to be feared, would have to be taken out of the category of charity. Pious foundations were constantly expressed to be 'pro remedio animae meae.' The true view is that the community benefits whether the giver is actuated by pure philanthropy, or by ostentation, business policy, political self-advertisement, or any other worldly or sordid motive. In taking this large view of charity the principle or policy, as Fitzgibbon L.J. pointed out, of our common law and of judicial decisions both in England and Ireland (where the Statute of Superstitious Uses is not in force) is identical with that which the philosophic historian describes as the policy of the Emperors and the Senate of Rome as far as it concerned religion. The various models of worship which prevailed in the Roman world were all considered as equally useful; that is to say, they all went and still go to strengthen the sanctions of positive law. They all inculcate respect for and obedience to the powers that be, and emphasize its ethical teaching. This is the Christianity of the common law. It is not its function to discriminate nicely differences of doctrine provided those doctrines make for righteousness.

A learned correspondent writes:—

'*Hatton* v. *Treeby*, '97, 2 Q.B. 452, 66 L.J.Q.B. 729, is a case which will give much more satisfaction to cyclists than to the ordinary public. It decides that a constable who sees a person riding a bicycle at night without a proper light, contrary to the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85, has no power to stop him for the purpose of ascertaining his name and address. The decision, in short, renders a law passed for the protection of the public all but a nullity.

'We have little doubt that the judgment of the Court is right; it rests on the very simple consideration that the constable claimed to exercise under an Act of Parliament a power which, though absolutely necessary for the effectiveness of the enactment, the Act did not give him.

'We have no doubt, however, that the judgment, right as it is, brings into view two of the weakest points in English law. It is a grave defect of our constitutional law that persons acting in the service of the Crown, that is of the public, are not treated as having at common law all the powers reasonably necessary for carrying any law into effect. It is a grave defect of our Courts that the judges construe statutes in a spirit different from that in which they construe the doctrines of the common law. In determining the meaning of a statute they look almost wholly at its words, in

applying a principle of common law they attempt, often with great success, to get at its meaning and policy. As has been pointed out more than once in this REVIEW, the unexpressed opposition to codification entertained by many English lawyers is supported, if not justified, by the fear that the Courts would put a narrow construction on the articles of a code.'

Our learned friend's general reflections are interesting, but we are unable to concur with him in regretting the decision. Cyclists are not a class apart from the ordinary public, neither does a man lose the ordinary rights of a citizen by riding a bicycle. Stopping a cyclist by force is not like stopping a man walking; it involves great risk of damage to the machine (which may well be an innocent third person's property), and also risk of grave bodily harm to the cyclist. No doubt it is wrong to refuse to stop when called on by an officer of the law known to be such, but it is not a felony justifying arrest at all hazards. Also the offence of riding without a light is much oftener due to a faulty lamp than to wilful disobedience. We should hear less of trouble between cyclists and policemen if magistrates and police in certain parts of the country would free themselves from the notion that a cyclist is a kind of outlaw.

Kerrison v. *Smith*, '97, 2 Q. B. 445, 66 L. J. Q. B. 762, in substance decides that when *X* has for a valid consideration contracted with *A* to allow him to make use of *A*'s land, *X* may indeed, if the contract does not amount to the creation of a distinct legal or equitable interest in the land, revoke the leave he has given; but *X* may be sued, not for revoking the license given to *A*, but for breaking his promise not to revoke it. The case appears to be well decided. Not only would it be rash on such a point lightly to question the authority of Collins L. J., but preceding authorities, including the leading case itself, *Wood* v. *Leadbitter*, 1845, 13 M. & W. 838, seem, when carefully read, to tend uniformly the same way. It may be said that the right of a landowner to revoke a license to enter his land is of little value if it at once exposes him to an action for breach of contract. But circumstances may well occur in which the risk is worth taking. They may be such, for example, as to afford a moral, though not a legal, justification for expelling the licensee, and to make it extremely improbable that he will venture to bring an action.

What we must call the experiment of the petitioner in *Moss* v. *Moss*, '97, P. 263, 66 L. J. P. 154, was not in vain if only that it

elicited a luminous judgment from Sir Francis Jeune. The principle which comes out in clear relief is that by the law of England—whatever may be the case in America—marriage is never dissolved for false representations. The common law of England is not a set of arbitrary rules imposed *ab extra*. It is rooted in the national characteristics and temperament of the English people, and the marriage law is an example of its robust good sense. The 'for better or worse' of the marriage service is only the principle of *caveat emptor* in another form. When a man and a woman plight their troth at the altar, he may be a man with a past: she may be a woman with a past: but between them there is a tacit convention that that past, whatever it is, shall be for ever condoned and cancelled. This is the compact of marriage as we hold it, not an acceptance by the spouses of one another on a number of implied conditions more or less exacting. Imagine the consequences if for some disparity of fortune or birth, some mistake as to qualities of mind or body, some sentimental scruple like that of the silly hero of Tess of the D'Urbervilles, either of the spouses could sever the marriage bond! We should have half the newly-married couples meditating, like Milton, on divorce before the honeymoon was ended under the influence of that disillusionment which so often follows in the wake of marriage. This consideration alone—the weakening of the marriage bond by the indulgence of caprice—is enough by itself to justify the policy of our law; but the conclusive objection to rescinding the marriage contract is that after marriage there is no *restitutio in integrum* possible. *Moss* v. *Moss* was no doubt a hard case, and the different solutions of the problem under different laws show that it is near the line. But it is not shown that a laxer rule would not bring in as great or greater hardships of other kinds.

The Judicial Trustees Act, 1896, is an Act of which we are likely to see a great deal in the future, dealing as it does not only with breaches of trust but devastavits as well. The decisions, however, so far as they have gone, are not of a kind to encourage the lax trustee to come for relief. They administer a tonic rather than a cordial (*Re Kay*, '97, 2 Ch. 518, 66 L. J. Ch. 759; *Re Stuart*, '97, 2 Ch. 583, 66 L. J. Ch. 780). On the face of the Act the discretionary power of relief is a large one. The Court may excuse the defaulting trustee if he has acted honestly and reasonably. Honesty is—for a psychological fact—a simple matter which even casuists cannot easily confuse, but 'reasonably' is a very different thing: it involves very complex considerations—a well-balanced judgment, a nice adjustment of the reasoning faculties to a perhaps

intricate and difficult state of facts, experience of the world too and of life: in fact, as Aristotle says, there are a thousand ways of going wrong and only one of going right. Reasonableness, when it comes to be estimated by the superior intelligence of the Court, connotes an alarming amount of shrewdness, foresight, and knowledge, so that we come round again to the same point—the ideal prudent man of business whom the Court has so often paraded before trustees. The hard and fast lines as to trustees' investments drawn by the Trustees Acts, 1888 and 1893, for instance, the two-thirds rule and the proper valuation, no longer fetter the discretion of the Court, but they still serve, according to Stirling J., as a criterion of conduct—of reasonableness: perhaps a still better criterion, as that learned judge suggested, is, Would the trustee have lent the money on such a security if it had been his own? It is amazing how keen-sighted and careful people become in money matters when their own property is at stake.

Nobody at present seems to have considered the effect of the Judicial Trustees Act, 1896, on the position of directors. The Courts have so long—rightly or wrongly—treated directors as trustees, that they cannot in conscience deny them any relief accorded to trustees; if so, the Act may have a very alleviating effect on the position of directors who have honestly misapplied the company's funds. Directors please note.

Re Peveril Gold Mines (affirmed W. N. '97, 166) puts a check on what has of late threatened to become a very mischievous practice, that is to say introducing clauses into a company's articles which give the shareholders away, entrap them into renouncing their rights. Entrap is not too strong a word; for, as every one knows, not one person in a hundred who takes shares ever looks at the articles. The most he does is to peruse the prospectus and perhaps glance at the memorandum. Yet no sooner has he applied for shares and received an allotment than he finds himself pledged to a number of things as irrevocably as if he had, as the Act says, entered into a covenant as to such matters with the company and the other shareholders. In the *Peveril* case the shareholder was pledged not to present a winding-up petition except with the consent of the Board, or a resolution of shareholders: not long ago it was an article pledging the shareholder not to take proceedings against the directors for misfeasance; obviously the device possesses —or possessed—infinite possibilities, and of course plausible defences are forthcoming for it:—the shareholders ought to read the articles—the majority must be entitled to coerce the minority in a co-opera-

tive enterprise, but if shareholders are to be legally gagged in this way, it is clear that the promoter who settles the articles and inserts what clauses he thinks convenient to himself is left master of the situation. With the decision of the Court of Appeal in the *Peveril* case this strategic movement of the promoter is outflanked, and its fate augurs ill for the 'waiver clause' in prospectuses, should that notorious device of disingenuousness be ever brought to the bar of a court of justice.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

A PROLOGUE TO A HISTORY OF ENGLISH LAW.

SUCH is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as *bishop*, *priest*, and *deacon*[1]. If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day[2]. A statute of limitations must be set; but it must be arbitrary. The web must be rent; but, as we rend it, we may watch the whence and whither of a few of the severed and ravelling threads which have been making a pattern too large for any man's eye.

To speak more modestly, we may, before we settle to our task, look round for a moment at the world in which our English legal history has its beginnings. We may recall to memory a few main facts and dates which, though they are easily ascertained, are not often put together in one English book, and we may perchance arrange them in a useful order if we make mile-stones of the centuries[3].

By the year 200 Roman jurisprudence had reached its zenith. Papinian was slain in 212[4], Ulpian in 228[5]. Ulpian's pupil Modestinus may be accounted the last of the great lawyers[6]. All too soon they became classical; their successors were looking backwards, not forwards. Of the work that had been done it were folly here to speak; but the law of a little town had become ecumenical law, law alike for cultured Greece and for wild Britain. And yet, though it had assimilated new matter and new ideas,

[1] Æthelb. 1.

[2] Ihering, Vorgeschichte der Indoeuropäer; see especially the editor's preface.

[3] The following summary has been compiled by the aid of Karlowa, Römische Rechtsgeschichte, 1885—Krüger, Geschichte der Quellen des römischen Rechts, 1888—Conrat, Geschichte der Quellen des römischen Rechts im früheren Mittelalter, 1889—Maassen, Geschichte der Quellen des canonischen Rechts, 1870—Löning, Geschichte des deutschen Kirchenrechts, 1878—Sohm, Kirchenrecht, 1892—Hinschius, System des katholischen Kirchenrechts, 1869 ff.—A. Tardif, Histoire des sources du droit canonique, 1887—Brunner, Deutsche Rechtsgeschichte, 1887—Schröder, Lehrbuch der deutschen Rechtsgeschichte, ed. 2, 1894—Esmein, Cours d'histoire du droit français, ed. 2, 1895—Viollet, Histoire du droit civil français, 1893.

[4] Krüger, op. cit. 198; Karlowa, op. cit. i. 736.

[5] Krüger, op. cit. 215; Karlowa, op. cit. i. 741.

[6] Krüger, op. cit. 226; Karlowa, op. cit. i. 752.

it had always preserved its tough identity. In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously summed up in the living and growing body of the law.

Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (*ecclesiae*) of non-conformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be; but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, if not a criminal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of 'benefit and burial societies' they would obtain some protection for their communal property[1]. But internally they were developing what was to be a system of constitutional and governmental law, which would endow the overseer (*episcopus*) of every congregation with manifold powers. Also they were developing a system of punitive law, for the offender might be excluded from all participation in religious rites, if not from worldly intercourse with the faithful[2]. Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a pre-eminence for itself and its overseer[3]. Long indeed would it be before this overseer of a non-conformist congregation would, in the person of his successor, place his heel upon the neck of the prostrate Augustus by virtue of God-made law. This was not to be foreseen; but already a merely human jurisprudence was losing its interest. The intellectual force which some years earlier might have taken a side in the debate between Sabinians and Proculians now invented or refuted a christological heresy. Ulpian's priesthood[4] was not priestly enough[5].

The decline was rapid. Long before the year 300 jurisprudence, the one science of the Romans, was stricken with sterility[6]; it was sharing the fate of art[7]. Its eyes were turned backwards to the

[1] Löning, op. cit. i. 195 ff.; Sohm, op. cit. 75. Löning asserts that in the intervals between the outbursts of persecution the Christian communities were legally recognized as *collegia tenuiorum*, capable of holding property. Sohm denies this.

[2] Excommunication gradually assumes its boycotting traits. The clergy were prohibited, while as yet the laity were not, from holding converse with the offender. Löning, op. cit. i. 264; Hinschius, op. cit. iv. 704.

[3] Sohm, op. cit. 378 ff.; Löning, op. cit. i. 423 ff.

[4] Dig. 1. 1. 1.

[5] The moot question (Krüger, op. cit. 203; Karlowa, op. cit. i. 739) whether the Tertullian who is the apologist of Christian sectaries is the Tertullian from whose works a few extracts appear in the Digest may serve as a mnemonic link between two ages.

[6] Krüger, op. cit. 260; Karlowa, op. cit. i. 932.

[7] Gregorovius, History of Rome (transl. Hamilton), i. 85. [The decline may well

departed great. The constitutions of the emperors now appeared as the only active source of law. They were a disordered mass, to be collected rather than digested. Collections of them were being unofficially made: the *Codex Gregorianus*, the *Codex Hermogenianus*. These have perished; they were made, some say, in the Orient[1]. The shifting eastward of the imperial centre and the tendency of the world to fall into two halves were not for the good of the West. Under one title and another, as *coloni*, *laeti*, *gentiles*, large bodies of untamed Germans were taking up their abode within the limit of the empire[2]. The Roman armies were becoming barbarous hosts. Constantine owed his crown to an Alamannian king[3].

It is on a changed world that we look in the year 400. After one last flare of persecution (303), Christianity became a lawful religion (313). In a few years it, or rather one species of it, had become the only lawful religion. The 'confessor' of yesterday was the persecutor of to-day. Heathenry, it is true, died hard in the West; but already about 350 a pagan sacrifice was by the letter of the law a capital crime[4]. Before the end of the century cruel statutes were being made against heretics of all sorts and kinds[5]. No sooner was the new faith lawful, than the state was compelled to take part in the multifarious quarrels of the Christians. Hardly had Constantine issued the edict of tolerance, than he was summoning the bishops to Arles (314), even from remote Britain, that they might, if this were possible, make peace in the church of Africa[6]. In the history of law, as well as in the history of dogma, the fourth century is the century of ecclesiastical councils. Into the debates of the spiritual parliaments of the empire[7] go whatever juristic ability and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor[8]. In 380 Theodosius himself commanded that all the peoples which owned his sway should follow, not merely the religion that Christ had

have been less sudden than has been commonly supposed: see Dr. Grueber's account of Prof. Hofmann's view, LAW QUARTERLY REVIEW, vii. 70. But this does not affect the main argument.—ED.]

[1] Krüger, op. cit. 277 ff.; Karlowa, op. cit. i. 941 ff. It is thought that the original edition of the Gregorianus was made about A.D. 295, that of the Hermogenianus between 314 and 324. But their dates are uncertain. For their remains see Corpus Iuris Anteiustiniani.

[2] Brunner, op. cit. i. 32–39. [3] Ibid. 38. [4] Löning, op. cit. i. 44.

[5] Löning, op. cit. i. 97–98, reckons 68 statutes from fifty-seven years (380–438).

[6] Hefele, Conciliengeschichte, i. 201. For the presence of the British bishops, see Haddan and Stubbs, Councils, i. 7.

[7] Sohm, op. cit. 443: 'Das ökumenische Koncil, die Reichssynode . . . bedeutet ein geistliches Parlament des Kaisertums.'

[8] Sohm, op. cit. 418. If a precise date may be fixed in a very gradual process, we may perhaps see the first exercise of legislative power in the decretal (A.D. 385) of Pope Siricius.

delivered to the world, but the religion that St. Peter had delivered to the Romans[1]. For a disciplinary jurisdiction over clergy and laity the state now left a large room wherein the bishops ruled[2]. As arbitrators in purely secular disputes they were active; it is even probable that for a short while under Constantine one litigant might force his adversary unwillingly to seek the episcopal tribunal[3]. It was necessary for the state to protest that criminal jurisdiction was still in its hands[4]. Soon the church was demanding, and in the West it might successfully demand, independence of the state and even a dominance over the state: the church may command and the state must obey[5]. If from one point of view we see this as a triumph of anarchy, from another it appears as a triumph of law, of jurisprudence. Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world.

Among the gigantic events of the fifth century the issue of a statute-book seems small. Nevertheless, through the turmoil we see two statute-books, that of Theodosius II and that of Euric the West Goth. The Theodosian code was an official collection of imperial statutes beginning with those of Constantine I. It was issued in 438 with the consent of Valentinian III who was reigning in the West. No perfect copy of it has reached us[6]. This by itself would tell a sad tale; but we remember how rapidly the empire was being torn in shreds. Already Britain was abandoned (407). We may doubt whether the statute-book of Theodosius ever reached our shores until it had been edited by Jacques Godefroi[7]. Indeed we may say that the fall of a loose stone in Britain brought the crumbling edifice to the ground[8]. Already before this code was published the hordes of Alans, Vandals, and Sueves had swept across Gaul and Spain; already the Vandals were in Africa. Already Rome had been sacked by the West Goths; they were founding a kingdom in southern Gaul and were soon to have a statute-book of their own. Gaiseric was not far off, nor Attila. Also let us remember that this Theodosian Code was by no means well designed if it was to perpetuate the memory of Roman civil science in a stormy age. It was no 'code' in our modern sense of that term. It was only a more or less methodic collection of

[1] Cod. Theod. 16. 1. 2.
[2] Löning, op. cit. i. 262 ff.; Hinschius, op. cit. iv. 788 ff.
[3] Löning, op. cit. i. 293; Karlowa, op. cit. i. 966. This depends on the genuineness of Constit. Sirmond. 1.
[4] Löning, op. cit. i. 305; Hinschius, op. cit. iv. 794. [5] Löning, op. cit. i. 64-94.
[6] Krüger, op. cit. 285 ff.; Karlowa, op. cit. i. 944.
[7] The Breviary of Alaric is a different matter.
[8] Bury, History of the Later Roman Empire, i. 142: 'And thus we may say that it was the loss or abandonment of Britain in 407 that led to the further loss of Spain and Africa.'

modern statutes. Also it contained many things that the barbarians had better not have read; bloody laws against heretics, for example.

We turn from it to the first monument of Germanic law that has come down to us. It consists of some fragments of what must have been a large law-book published by Euric for his West Goths, perhaps between 470 and 475[1]. Euric was a conquering king; he ruled Spain and a large part of southern Gaul; he had cast off, so it is said, even the pretence of ruling in the emperor's name. Nevertheless, his laws are not nearly so barbarous as our curiosity might wish them to be. These West Goths who had wandered across Europe were veneered by Roman civilization. It did them little good. Their later law-books, that of Reckessuinth (652–672), that of Erwig (682), that of Egica (687–701), are said to be verbose and futile imitations of Roman codes. But Euric's laws are sufficient to remind us that the order of date among these *Leges Barbarorum* is very different from the order of barbarity. Scandinavian laws that are not written until the thirteenth century will often give us what is more archaic than anything that comes from the Gaul of the fifth or the Britain of the seventh. And, on the other hand, the mention of Goths in Spain should remind us of those wondrous folk-wanderings and of their strange influence upon the legal map of Europe. The Saxon of England has a close cousin in the Lombard of Italy, and modern critics profess that they can see a specially near kinship between Spanish and Icelandic law[2].

In legal history the sixth century is the century of Justinian. But in the west of Europe this age appears as his, only if we take into account what was then a remote future. How powerless he was to legislate for many of the lands and races whence he drew his grandiose titles—*Alamannicus*, *Gothicus*, *Francicus* and the rest—we shall see if we inquire who else had been publishing laws. The barbarians had been writing down their customs. The barbarian kings had been issuing law-books for their Roman subjects. Books of ecclesiastical law, of conciliar and papal law, were being compiled[3].

The discovery of fragments of the laws of Euric the West Goth

[1] Zeumer, Leges Visigothorum Antiquiores, 1894; Brunner, op. cit. i. 320; Schröder, op. cit. 230.

[2] Ficker, Untersuchungen zur Erbenfolge, 1891–5; Ficker, Ueber nähere Verwandtschaft zwischen gothisch-spanischem und norwegisch-isländischem Recht (Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. 456 ff.). These attempts to reconstruct the genealogy of the various Germanic systems are very interesting, if hazardous.

[3] For a map of Europe at the time of Justinian's legislation see Hodgkin, Italy and her Invaders, vol. iv. p. 1.

has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic custom. But if not the oldest, it is still very old; also it is rude and primitive[1]. It comes to us from the march between the fifth and the sixth centuries; almost certainly from the victorious reign of Chlodwig (486–511). An attempt to fix its date more closely brings out one of its interesting traits. There is nothing distinctively heathen in it; but (and this makes it unique[2]) there is nothing distinctively Christian. If the Sicambrian has already bowed his neck to the catholic yoke, he is not yet actively destroying by his laws what he had formerly adored[3]. On the other hand, his kingdom seems to stretch south of the Loire, and he has looked for suggestions to the laws of the West Goths. The *Lex Salica*, though written in Latin, is very free from the Roman taint. It contains in the so-called malberg glosses many old Frankish words, some of which, owing to mistranscription, are puzzles for the philological science of our own day. Like the other Germanic folk-laws, it consists largely of a tariff of offences and atonements; but a few precious chapters, every word of which has been a cause of learned strife, lift the curtain for a moment and allow us to watch the Frank as he litigates. We see more clearly here than elsewhere the formalism, the sacramental symbolism of ancient legal procedure. We have no more instructive document; and let us remember that, by virtue of the Norman Conquest, the *Lex Salica* is one of the ancestors of English law.

Whether in the days when Justinian was legislating, the Western or Ripuarian Franks had written law may not be certain; but it is thought that the main part of the *Lex Ribuaria* is older than 596[4]. Though there are notable variations, it is in part a modernized edition of the *Salica*, showing the influence of the clergy and of Roman law. On the other hand, there seems little doubt that the core of the *Lex Burgundionum* was issued by King Gundobad (474–516) in the last years of the fifth century[5].

Burgundians and West Goths were scattered among Roman provincials. They were East Germans; they had long been Christians, though addicted to the heresy of Arius. They could say that they had Roman authority for their occupation of Roman

[1] Brunner, op. cit. i. 292 ff.; Schröder, op. cit. 226 ff.; Esmein, op. cit. 102 ff.; Dahn, Die Könige der Germanen, vii. (2) 50 ff.; Hessels and Kern, Lex Salica, The ten texts, 1880.

[2] However, there are some curious relics of heathenry in the *Lex Frisionum*: Brunner, op. cit. i. 342.

[3] Greg. Turon. ii. 22 (ed. Omont, p. 60): 'Mitis depone colla, Sicamber; adora quod incendisti, incende quod adorasti.'

[4] Brunner, op. cit. i. 303 ff.; Schröder, op. cit. 229; Esmein, op. cit. 107. Edited by Sohm in M. G.

[5] Brunner, op. cit. i. 332 ff.; Schröder, op. cit. 234; Esmein, op. cit. 108. Edited by v. Salis in M. G.

soil. Aquitania Secunda had been made over to the West Goths; the Burgundians vanquished by Aetius had been deported to Savoy[1]. In their seizure of lands from the Roman *possessores* they had followed, though with modifications that were profitable to themselves, the Roman system of billeting barbarian soldiers[2]. There were many *Romani* as well as many *barbari* for whom their kings could legislate. Hence the *Lex Romana Burgundionum* and the *Lex Romana Visigothorum*. The former[3] seems to be the law-book that Gundobad promised to his Roman subjects; he died in 516. Rules have been taken from the three Roman *codices*, from the current abridgments of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of this book. Far more comprehensive and far more important was the Breviary of Alaric or *Lex Romana Visigothorum*[4]. Euric's son, Alaric II, published it in 506 as a statute-book; among the *Romani* of his realm it was to supplant all older books. It contained large excerpts from the Theodosian Codex, a few from the *Gregorianus* and *Hermogenianus*, some post-Theodosian constitutions, some of the *Sententiae* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. The greater part of these texts was equipped with a running commentary (*interpretatio*) which attempted to give their upshot in a more intelligible form. It is thought nowadays that this 'interpretation' and the sorry version of Gaius represent, not Gothic barbarism, but degenerate Roman science. A time had come when lawyers could no longer understand their own old texts and were content with debased abridgments[5].

The West Goths' power was declining. Hardly had Alaric issued his statute-book when he was slain in battle by the Franks. Soon the Visigothic became a Spanish kingdom. But it was not in Spain that the *Breviarium* made its permanent mark. There it was abrogated by Reckessuinth when he issued a code for all his subjects of every race[6]. On the other hand, it struck deep root in Gaul. It became the principal, if not the only, representative of Roman law in the expansive realm of the Franks. But even it was too bulky for men's needs. They made epitomes of it and epitomes of epitomes[7].

Then, again, we must remember that while Tribonian was busy

[1] Brunner, op. cit. i. 50–1.
[2] Krüger, op. cit. 317; Brunner, op. cit. i. 354; Schröder, op. cit. 234. Edited by v. Salis in M. G.
[3] Ibid. 64–7.
[4] Krüger, op. cit. 309; Brunner, op. cit. i. 358. Edited by Hänel, 1849.
[5] Karlowa, op. cit. i. 976.
[6] See above, p. 17.
[7] The epitomes will be found in Hänel's edition, Lex Romana Visigothorum 1849.

upon the Digest, the East Goths were still masters of Italy. We recall the event of 476; one emperor, Zeno at Byzantium, was to be enough. Odovacer had ruled as patrician and king. He had been conquered by the East Goths. The great Theodoric had reigned for more than thirty years (493–526); he had tried to fuse Italians and Goths into one nation; he had issued a considerable body of law, the *Edictum Theodorici*, for the more part of a criminal kind [1].

Lastly, it must not escape us that about the year 500 there was in Rome a monk of Scythian birth who was labouring upon the foundations of the *Corpus Iuris Canonici*. He called himself Dionysius Exiguus. He was an expert chronologist and constructed the Dionysian cycle. He was collecting and translating the canons of eastern councils; he was collecting also some of the letters (decretal letters they will be called) that had been issued by the popes from Siricius onwards (384–498) [2]. This *Collectio Dionysiana* made its way in the West. Some version of it may have been the book of canons which our Archbishop Theodore produced at the Council of Hertford in 673 [3]. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774 [4]. It helped to spread abroad the notion that the popes can declare, even if they can not make, law for the universal church, and thus to contract the sphere of secular jurisprudence.

In 528 Justinian began the work which gives him his fame in legal history; in 534, though there were novel constitutions to come from him, it was finished. Valuable as the code of imperial statutes might be, valuable as might be the modernized and imperial edition of an excellent but ancient school-book, the main work that he did for the coming centuries lies in the Digest. We are told nowadays that in the Orient the classical jurisprudence had taken a new lease of life, especially in the schools at Berytus [5]. We are told that there is something of a renaissance, something even of an antiquarian revival visible in the pages of the Digest, a desire to go back from vulgar practice to classical text, also a desire to display an erudition that is not always very deep. Great conqueror, great builder, great theologian, great law-giver, Justinian would also be a great master of legal science and legal history. The narrow escape of his Digest from oblivion seems to tell us that, but for his exertions, very little of the ancient treasure

[1] Brunner, op. cit. i. 365; Karlowa, op. cit. i. 947 ff. Edited by Bluhme in M. G.
[2] Maassen, op. cit. i. 422 ff.; Tardif, op. cit. 110. Printed in Migne, Patrologia, vol. 67.
[3] Haddan and Stubbs, Councils, iii. 119. See, however, the remarks of Mr. C. H. Turner, E. H. R. ix. 727.
[4] Maassen, op. cit. i. 441.
[5] Krüger, op. cit. 319.

of wisdom would have reached modern times; and a world without the Digest would not have been the world that we know. Let us, however, remember the retrospective character of the book. The *ius*, the unenacted law, ceased to grow three hundred years ago. In time Justinian stands as far from the jurists whose opinions he collects as we stand from Coke or even from Fitzherbert.

Laws have need of arms: Justinian knew it well. Much depended upon the fortunes of a war. We recall from the Institutes the boast that Africa has been reclaimed. Little was at stake there, for Africa was doomed to the Saracens: nor could transient success in Spain secure a western home for the law-books of Byzantium [1]. All was at stake in Italy. The struggle with the East Goths was raging; Rome was captured and recaptured. At length the emperor was victorious (552), the Goths were exterminated or expelled; we hear of them no more. Justinian could now enforce his laws in Italy, and this he did by the pragmatic sanction *pro petitione Vigilii* (554) [2]. Fourteen years were to elapse and then the Lombard hordes under Alboin would be pouring down upon an exhausted and depopulated land. Those fourteen years are critical in legal history; they suffer Justinian's books to obtain a lodgment in the West. The occidental world has paid heavily for Code and Digest in the destruction of the Gothic kingdom, in the temporal power of the papacy, and in an Italy never united until our own day; but perhaps the price was not too high. Be that as it may, the coincidence is memorable. The Roman empire centred in New Rome has just strength enough to hand back to Old Rome the guardianship of her heathen jurisprudence, now 'enucleated' (as Justinian says) in a small compass, and then loses for ever the power of legislating for the West. True that there is the dwindling exarchate in Italy; true that the year 800 is still far off; true that one of Justinian's successors, Constantine IV, will pay Rome a twelve days' visit (663) and rob it of ornaments that Vandals have spared [3]; but with what we must call Graeco-Roman jurisprudence, with the Ecloga of Leo the Isaurian and the Basilica of Leo the Wise, the West, if we except some districts of southern Italy [4], has no concern. Two halves of the world were drifting apart, were becoming ignorant of each other's language, intolerant of each other's theology. He who was to be the true lord of Rome, if he loathed the Lombard, loved not the emperor. Justinian had taught Pope Vigilius, the

[1] Conrat, op. cit. i. 32.
[2] Krüger, op. cit. 354; Karlowa, op. cit. i. 938; Hodgkin, Italy and her Invaders, vi. 519.
[3] Gregorovius, History of Rome (transl. Hamilton), ii. 153 ff.; Oman, Dark Ages, 237, 245.
[4] For Byzantine law in southern Italy, see Conrat, op. cit. i. 49.

Vigilius of the pragmatic sanction, that in the Byzantine system the church must be a department of the state[1]. The bishop of Rome did not mean to be the head of a department.

During some centuries Pope Gregory the Great (590–604) is one of the very few westerns whose use of the Digest can be proved[2]. He sent Augustin to England. Then 'in Augustin's day,' about the year 600, Æthelbert of Kent set in writing the dooms of his folk 'in Roman fashion[3].' Not improbably he had heard of Justinian's exploits; but the dooms, though already they are protecting with heavy *bót* the property of God, priests and bishops, are barbarous enough. They are also, unless discoveries have yet to be made, the first Germanic laws that were written in a Germanic tongue. In many instances the desire to have written laws appears so soon as a barbarous race is brought into contact with Rome[4]. The acceptance of the new religion must have revolutionary consequences in the world of law, for it is likely that heretofore the traditional customs, even if they have not been conceived as instituted by gods who are now becoming devils, have been conceived as essentially unalterable. Law has been the old; new law has been a contradiction in terms. And now about certain matters there must be new law. What is more, 'the example of the Romans' shows that new law can be made by the issue of commands. Statute appears as the civilized form of law. Thus a fermentation begins and the result is bewildering. New resolves are mixed up with statements of old custom in these *Leges Barbarorum*.

The century which ends in 700 sees some additions made to the Kentish laws by Hlothær and Eadric, and some others made by Wihtræd; there the Kentish series ends. It also sees in the dooms of Ine the beginning of written law in Wessex[5]. It also sees the beginning of written law among the Lombards; in 643 Rothari published his edict[6]; it is accounted to be one of the best statements of ancient German usages. A little later the Swabians have their *Lex Alamannorum*[7], and the Bavarians their *Lex Baiu-*

[1] Hodgkin, Italy and her Invaders, iv. 571 ff.: 'The Sorrows of Vigilius.'

[2] Conrat, op. cit. i. 8.

[3] Liebermann, Gesetze der Angelsachsen, p. 3. The first instalment of Dr. Liebermann's great work comes to our hands as these pages go through the press. Bede, Hist. Eccl. lib. 2, c. 5 (ed. Plummer, i. 90): 'iuxta exempla Romanorum.' Bede himself (Opera, ed. Giles, vol. vi. p. 321) had read of Justinian's Codex; but what he says of it seems to prove that he had never seen it: Conrat, op. cit. i. 99.

[4] Brunner, op. cit. i. 283. So native princes in India have imitated the Indian Penal Code within their states.

[5] Whether we have Ine's code or only an Alfredian recension of it is a difficult question, lately discussed by Turk, Legal Code of Ælfred (Halle, 1893), p. 42.

[6] Brunner, op. cit. i. 368; Schröder, op. cit. 236. Edited by Bluhme in M. G.

[7] Brunner, op. cit. i. 308; Schröder, op. cit. 238. Edited by Lehmann in M. G. There are fragments of a *Pactus Alamannorum* from circ. 600. The *Lex* is supposed to come from 717–9.

wariorum[1]. It is only in the Karolingian age that written law appears among the northern and eastern folks of Germany, the Frisians, the Saxons, the Angli and Warni of Thuringia, the Franks of Hamaland[2]. To a much later time must we regretfully look for the oldest monuments of Scandinavian law[3]. Only two of our 'heptarchic' kingdoms leave us law, Kent and Wessex, though we have reason to believe that Offa the Mercian (ob. 796) legislated[4]. Even Northumbria, Bede's Northumbria, which was a bright spot in a dark world, bequeaths no dooms. The impulse of Roman example soon wore out. When once a race has its *Lex*, its aspirations seem to be satisfied. About the year 900 Alfred speaks as though Offa (circ. 800), Ine (circ. 700), Æthelbert (circ. 600) had left him little to do. Rarely upon the mainland was there any authoritative revision of the ancient *Leges*, though transcribers sometimes modified them to suit changed times, and by so doing have perplexed the task of modern historians. Only among the Lombards, who from the first, despite their savagery, seem to show something that is like a genius for law[5], was there steadily progressive legislation. Grimwald (668), Liutprand (713–35), Ratchis (746), and Aistulf (755) added to the edict of Rothari. Not by abandoning, but by developing their own ancient rules, the Lombards were training themselves to be the interpreters and in some sort the heirs of the Roman *prudentes*.

As the Frankish realm expanded, there expanded with it a wonderful 'system of personal laws[6].' It was a system of racial laws. The *Lex Salica*, for example, was not the law of a district, it was the law of a race. The Swabian, wherever he might be, lived under his Alamannic law, or, as an expressive phrase tells us, he lived Alamannic law (*legem vivere*). So Roman law was the law of the Romani. In a famous, if exaggerated sentence, Bishop Agobard of Lyons has said that often five men would be walking or sitting together and each of them would own a different law[7]. We are now taught that this principle is not primitively Germanic. Indeed in England, where there were no Romani, it never came to the front, and, for example, 'the Danelaw' very rapidly became

[1] Brunner, op. cit. i. 313; Schröder, op. cit. 239. Edited by Merkel in M. G. This is now ascribed to the years 739–48.

[2] Brunner, op. cit. i. 340 ff.; Schröder, op. cit. 240 ff. Edited by v. Richthofen and Sohm in M. G.

[3] K. Maurer, Ueberblick über die Geschichte der nordgermanischen Rechtsquellen in v. Holtzendorff, Encyklopädie.

[4] Alfred, Introduction, 49, § 9 (Liebermann, Gesetze, p. 46).

[5] Brunner, op. cit. i. 370; Schröder, op. cit. 235.

[6] Brunner, op. cit. i. 259; Schröder, op. cit. 225; Esmein, op. cit. 57.

[7] Agobardi Opera, Migne, Patrol. vol. 104, col. 116: 'Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat.'

the name for a tract of land[1]. But in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of a population, the bulk of which was Gallo-Roman, and the barbarians, at least in show, had made their entry as subjects or allies of the emperor. It was natural then that the Romani should live their old law, and, as we have seen, their rulers were at pains to supply them with books of Roman law suitable to an age which would bear none but the shortest of law-books. It is doubtful whether the Salian Franks made from the first any similar concession to the provincials whom they subdued; but, as they spread over Gaul, always retaining their own *Lex Salica*, they allowed to the conquered races the right that they claimed for themselves. Their victorious career gave the principle an always wider scope. At length they carried it with them into Italy and into the very city of Rome. It would seem that among the Lombards, the Romani were suffered to settle their own disputes by their own rules, but Lombard law prevailed between Roman and Lombard. However, when Charles the Great vanquished Desiderius and made himself king of the Lombards, the Frankish system of personal law found a new field. A few years afterwards (800) a novel Roman empire was established. One of the immediate results of this many-sided event was that Roman law ceased to be the territorial law of any part of the lands that had become subject to the so-called Roman Emperor. Even in Rome it was reduced to the level of a personal or racial law, while in northern Italy there were many Swabians who lived Alamannic, of Franks who lived Salic or Ripuarian law, besides the Lombards[2]. In the future the *renovatio imperii* was to have a very different effect. If the Ottos and Henries were the successors of Augustus, Constantine, and Justinian, then Code and Digest were *Kaiserrecht*, statute law for the renewed empire. But some centuries were to pass before this theory would be evolved, and yet other centuries before it would practically mould the law of Germany. Meanwhile Roman law was in Rome itself only the personal law of the Romani.

A system of personal laws implies rules by which a 'conflict of laws' may be appeased, and of late years many of the international or intertribal rules of the Frankish realm have been recovered[3]. We may see, for example, that the law of the slain, not that of the slayer, fixes the amount of the wergild, and that the law of the grantor prescribes the ceremonies with which land must be conveyed. We see that legitimate children take their father's, bastards

[1] Stubbs, Constit. Hist. i. 216. See, however, Dahn, Könige der Germanen, vii. (3), p. 1 ff.
[2] Brunner, op. cit. i. 260. [3] Ibid. 261 ff.

their mother's law. We see also that the churches, except some which are of royal foundation, are deemed to live Roman law, and in Italy, though not in Frankland, the rule that the individual cleric lives Roman law seems to have been gradually adopted[1]. This gave the clergy some interest in the old system. But German and Roman law were making advances towards each other. If the one was becoming civilized, the other had been sadly barbarized, or rather vulgarized. North of the Alps the current Roman law regarded Alaric's *Lex* as its chief authority. In Italy Justinian's Institutes and Code and Julian's epitome of the Novels were known, and someone may sometimes have opened a copy of the Digest. But everywhere the law administered among the Romani seems to have been in the main a traditional, customary law which paid little heed to written texts. It was, we are told, *ein römisches Vulgarrecht*, which stood to pure Roman law in the same relation as that in which the vulgar Latin or Romance that people talked stood to the literary language[2]. Not a few of the rules and ideas which were generally prevalent in the West had their source in this low Roman law. In it starts the history of modern conveyancing. The Anglo-Saxon 'land-book' is of Italian origin[3]. That England produces no formulary books, no books of 'precedents in conveyancing,' such as those which in considerable numbers were compiled in Frankland[4], is one of the many signs that even this low Roman law had no home here; but neither did our forefathers talk low Latin.

In the British India of to-day we may see, and on a grand scale, what might well be called a system of personal laws, of racial laws[5]. If we compared it with the Frankish, one picturesque element would be wanting. Suppose that among the native races there was one possessed of an old law-book, too good for it, too good for us, which gradually, as men studied it afresh, would begin to tell of a very ancient but eternally modern civilization and of a skilful jurisprudence which the lawyers of the ruling race would some day make their model. This romance of history will not repeat itself.

During the golden age of the Frankish supremacy, the age which closely centres round the year 800, there was a good deal of definite legislation: much more than there was to be in the bad time that was coming. The king or emperor issued capitularies (*capitula*)[6].

[1] Brunner, op. cit. i. 269; Löning, op. cit. ii. 284. [2] Brunner, op. cit. i. 255.
[3] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, i. 187.
[4] Brunner, D. R. G. i. 401; Schröder, op. cit. 254. Edited in M. G. by Zeumer; also by E. de Rozière, Recueil général des formules.
[5] The comparison has occurred to M. Esmein, op. cit. 56.
[6] Brunner, op. cit. i. 374; Schröder, op. cit. 247; Esmein, op. cit. 116. Edited in M. G. by Boretius and Krause; previously by Pertz.

Within a sphere which can not be readily defined he exercised a power of laying commands upon all his subjects, and so of making new territorial law for his whole realm or any part thereof; but in principle any change in the law of one of the folks would require that folk's consent. A superstructure of capitularies might be reared, but the *Lex* of a folk was not easily alterable. In 827 Ansegis, Abbot of St. Wandrille, collected some of the capitularies into four books [1]. His work seems to have found general acceptance, though it shows that many capitularies were speedily forgotten and that much of the Karolingian legislation had failed to produce a permanent effect. Those fratricidal wars were beginning. The legal products which are to be characteristic of this unhappy age are not genuine laws; they are the forged capitularies of Benedict the Levite and the false decretals of the Pseudo-Isidore.

Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went, for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canons were collected into the same book, and the decretal letters of later were added to those of earlier popes. Of the *Dionysiana* we have already spoken. Another celebrated collection seems to have taken shape in the Spain of the seventh century; it has been known as the *Hispana* or *Isidoriana* [2], for without sufficient warrant it has been attributed to that St. Isidore of Seville (ob. 636), whose *Origines* [3] served as an encyclopaedia of jurisprudence and all other sciences. The *Hispana* made its way into France, and it seems to have already comprised some spurious documents before it came to the hands of the most illustrious of all forgers.

Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the *Hispana*; but into it there had been foisted, besides other forgeries, some sixty decretals professing to come from the very earliest successors of St. Peter. The compiler called himself Isidorus Mercator; he seems to have tried to personate Isidore of Seville. Many guesses have been made as to his name and time and home. It seems certain that he did his work in Frankland

[1] Brunner, op. cit. i. 382; Schröder, op. cit. 251; Esmein, op. cit. 117.
[2] Maassen, op cit. i. 667 ff.; Tardif, op. cit. 117. Printed in Migne, Patrol. vol. 84.
[3] For the Roman law of the Origines, see Conrat, op. cit. i. 150. At first or second hand this work was used by the author of our *Leges Henrici*. That the learned Isidore knew nothing of Justinian's books seems to be proved, and this shows that they were not current in Spain.

and near the middle of the ninth century. He has been sought as far west as le Mans, but suspicion hangs thickest over the church of Reims. The false decretals are elaborate mosaics made up out of phrases from the bible, the fathers, genuine canons, genuine decretals, the West Goth's Roman law-book; but all these materials, wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacrosanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome. Episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. Above all (and this is the burden of the song), no accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui.*

Closely connected with this fraud was another. Someone who called himself a deacon of the church of Mainz and gave his name as Benedict, added to the four books of capitularies, which Ansegis had published, three other books containing would-be, but false, capitularies, which had the same bent as the decretals concocted by the Pseudo-Isidore. These are not the only, but they are the most famous manifestations of the lying spirit which had seized the Frankish clergy. The Isidorian forgeries were soon accepted at Rome. The popes profited by documents which taught that ever since the apostolic age the bishops of Rome had been declaring, or even making, law for the universal church. On this rock or on this sand a lofty edifice was reared [1].

And now for the greater part of the Continent comes the time when ecclesiastical law is the only sort of law that is visibly growing. The stream of capitularies ceased to flow; there was none to legislate; the Frankish monarchy was going to wreck and ruin; feudalism was triumphant. Sacerdotalism also was triumphant, and its victories were closely connected with those of feudalism. The clergy had long been striving to place themselves beyond the reach of the state's tribunals. The dramatic struggle between Henry II and Becket has a long Frankish prologue [2]. Some concessions had been won from the Merovingians; but still Charles the Great had been supreme over all persons and in all causes. Though his realm fell asunder, the churches were united, and united by a principle that claimed a divine origin. They were rapidly evolving law which was in course of time to be the written law of an universal and theocratic monarchy. The mass, now

[1] The Decretales Pseudo-Isidorianae were edited by Hinschius in 1863. See also Tardif, op. cit. 133 ff.; Conrat, op. cit. i. 299; Brunner, op. cit. i. 384.
[2] Hinschius, op. cit. iv. 849 ff.

swollen by the Isidorian forgeries, still rolled from diocese to diocese, taking up new matter into itself. It became always more lawyerly in form and texture as it appropriated sentences from the Roman law-books and made itself the law of the only courts to which the clergy would yield obedience. Nor was it above borrowing from Germanic law, for thence it took its probative processes, the oath with oath-helpers and the ordeal or judgment of God. Among the many compilers of manuals of church law three are especially famous: Regino, abbot of Prüm (906–915)[1]; Burchard, bishop of Worms (1012–1023)[2]; and Ivo, bishop of Chartres (ob. 1117)[3]. They and many others prepared the way for Gratian, the maker of the church's Digest, and events were deciding that the church should also have a Code and abundant Novels. In an evil day for themselves the German kings took the papacy from the mire into which it had fallen, and soon the work of issuing decretals was resumed with new vigour. At the date of the Norman Conquest the flow of these edicts was becoming rapid.

Historians of French and German law find that a well-marked period is thrust upon them. The age of the folk-laws and the capitularies, 'the Frankish time,' they can restore. Much indeed is dark and disputable; but much has been made plain during the last thirty years by their unwearying labour. There is no lack of materials, and the materials are of a strictly legal kind: laws and statements of law. This done, they are compelled rapidly to pass through several centuries to a new point of view. They take their stand in the thirteenth among law-books which have the treatises of Glanvill and Bracton for their English equivalents. It is then a new world that they paint for us. To connect this new order with the old, to make the world of 'the classical feudalism[4]' grow out of the world of the folk-laws is a task which is being slowly accomplished by skilful hands; but it is difficult, for, though materials are not wanting, they are not of a strictly legal kind; they are not laws, nor law-books, nor statements of law. The intervening, the dark age, has been called 'the diplomatic age,' whereby is meant that its law must be hazardously inferred from *diplomata*, from charters, from conveyances, from privileges accorded to particular churches or particular towns. No one legislates. The French historian will tell us that the last capitularies which bear

[1] Tardif, op. cit. 162. Printed in Migne, Patrol. vol. 132; also edited by Wasserschleben, 1840.
[2] Ibid. 164. Printed in Migne, Patrol. vol. 140.
[3] Ibid. 170. Printed in Migne, Patrol. vol. 161.
[4] We borrow *la féodalité classique* from M. Flach: Les origines de l'ancienne France, ii. 551.

the character of general laws are issued by Carloman II in 884, and that the first legislative *ordonnance* is issued by Louis VII in 1155[1]. Germany and France were coming to the birth, and the agony was long. Long it was questionable whether the western world would not be overwhelmed by Northmen and Saracens and Magyars; perhaps we are right in saying that it was saved by feudalism[2]. Meanwhile the innermost texture of human society was being changed; local customs were issuing from and then consuming the old racial laws.

Strangely different, at least upon its surface, is our English story. The age of the capitularies (for such we well might call it) begins with us just when it has come to its end upon the Continent. We have had some written laws from the newly converted Kent and Wessex of the seventh century. We have heard that in the day of Mercia's greatness Offa (ob. 796), influenced perhaps by the example of Charles the Great, had published laws. These we have lost; but we have no reason to fear that we have lost much else. Even Egbert did not legislate. The silence was broken by Alfred, and then we have laws from almost every king: from Edward, Æthelstan, Edmund, Edgar, Æthelred, and Cnut. The age of the capitularies begins with Alfred, and in some sort it never ends, for William the Conqueror and Henry I take up the tale[3].) Whether in the days of the Confessor, whom a perverse, though explicable, tradition honoured as a pre-eminent lawgiver, we were not on the verge of an age without legislation, an age which would but too faithfully reproduce some bad features of the Frankish decadence, is a question that is not easily answered. Howbeit, Cnut had published in England a body of laws which, if regard be had to its date, must be called a handsome code. If he is not the greatest legislator of the eleventh century, we must go as far as Barcelona to find his peer[4]. He had been to Rome; he had seen an emperor crowned by a pope; but it was not outside England that he learnt to legislate. He followed a fashion set by Alfred. We might easily exaggerate both the amount of new matter that was con-

[1] Esmein, op. cit. 487–8; Viollet, op. cit. 152. Schröder, op. cit. 624: 'Vom 10. bis 12. Jahrhundert ruhte die Gesetzgebung fast ganz ... Es war die Zeit der Alleinherrschaft des Gewohnheitsrechtes.'

[2] Oman, The Dark Ages, 511.

[3] As to the close likeness between the English dooms and the Frankish capitularies, see Stubbs, Const. Hist. i. 223. We might easily suppose direct imitation, were it not that much of the Karolingian system was in ruins before Alfred began his work.

[4] The Usatici Barchinonensis Patriae (printed by Giraud, Histoire du droit français, ii. 465 ff.) are ascribed to Raymond Berengar I and to the year 1068 or thereabouts. But how large a part of them really comes from him is a disputable question. See Conrat, op. cit. i. 467; Ficker, Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. p. 236.

tained in these English capitularies and the amount of information that they give us; but the mere fact that Alfred sets, and that his successors, and among them the conquering Dane, maintain, a fashion of legislating, is of great importance. The Norman subdues, or, as he says, inherits a kingdom in which a king is expected to publish laws.

Were we to discuss the causes of this early divergence of English from continental history we might wander far. In the first place, we should have to remember the small size, the plain surface, the definite boundary of our country. This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation. Also we should notice that the kingship of England, when once it exists, preserves its unity: it is not partitioned among brothers and cousins. Moreover we might find ourselves saying that the Northmen were so victorious in their assaults on our island that they did less harm here than elsewhere. In the end it was better that they should conquer a tract, settle in villages and call the lands by their own names, than that the state should go to pieces in the act of repelling their inroads. Then, again, it would not escape us that a close and confused union between church and state prevented the development of a body of distinctively ecclesiastical law which would stand in contrast with, if not in opposition to, the law of the land[1]. Such power had the bishops in all public affairs, that they had little to gain from decretals forged or genuine[2]: indeed Æthelred's laws are apt to become mere sermons preached to a disobedient folk. However, we are here but registering the fact that the age of capitularies, which was begun by Alfred, does not end. The English king, be he weak like Æthelred or strong like Cnut, is expected to publish laws.

But Italy was to be for a while the focus of the whole world's legal history. For one thing, the thread of legislation was never quite broken there. Capitularies or statutes which enact territorial law came from Karolingian emperors and from Karolingian kings of Italy, and then from the Ottos and later German kings. But what is more important is that the old Lombard law showed a marvellous vitality and a capacity of being elaborated into a reasonable and progressive system. Lombardy was the country in which the principle of personal law struck its deepest roots. Besides Lombards and Romani, there were many Franks and

[1] Stubbs, Const. Hist. i. 263: 'There are few if any records of councils distinctly ecclesiastical held during the tenth century in England.'

[2] There seem to be traces of the Frankish forgeries in the Worcester book described by Miss Bateson, E. H. R. x. 712 ff. English ecclesiastics were borrowing, and it is unlikely that they escaped contamination.

Swabians who transmitted their law from father to son. It was long before the old question *Qua lege vivis?* lost its importance. The 'conflict of laws' seems to have favoured the growth of a mediating and instructed jurisprudence. Then at Pavia, in the first half of the eleventh century, a law-school had arisen. In it men were endeavouring to systematize by gloss and comment the ancient Lombard statutes of Rothari and his successors. The heads of the school were often employed as royal justices (*iudices palatini*); their names and their opinions were treasured by admiring pupils. From out this school came Lanfranc. Thus a body of law, which though it had from the first been more neatly expressed than, was in its substance strikingly like, our own old dooms, became the subject of continuous and professional study. The influence of reviving Roman law is not to be ignored. These Lombardists knew their Institutes, and, before the eleventh century was at an end, the doctrine that Roman law was a subsidiary common law for all mankind (*lex omnium generalis*) was gaining ground among them; but still the law upon which they worked was the old Germanic law of the Lombard race. Pavia handed the lamp to Bologna, Lombardy to the Romagna [1].

As to the more or less that was known of the ancient Roman texts there has been learned and lively controversy in these last years [2]. But, even if we grant to the champions of continuity all that they ask, the sum will seem small until the eleventh century is reached. That large masses of men in Italy and southern France had Roman law for their personal law is beyond doubt. Also it is certain that Justinian's Institutes and Code and Julian's Epitome of the Novels were beginning to spread outside Italy. There are questions still to be solved about the date and domicile of various small collections of Roman rules which some regard as older than or uninfluenced by the work of the Bolognese glossators. One critic discovers evanescent traces of a school of law at Rome or at Ravenna which others cannot see. The current instruction of boys in grammar and rhetoric involved some discussion of legal terms. Definitions of *lex* and *ius* and so forth were learnt by heart; little

[1] Boretius, Preface to edition of Liber legis Langobardorum, in M. G.; Brunner, op. cit. i. 387 ff.; Ficker, Forschungen zur Reichs- u. Rechtsgeschichte Italiens, iii. 44 ff., 139 ff.; Conrat, op. cit. i. 393 ff.

[2] It is well summed up for English readers by Rashdall, Universities of Europe, i. 89 ff. The chief advocate of a maximum of knowledge has been Dr. Hermann Fitting in Juristische Schriften des früheren Mittelalters, 1876, Die Anfänge der Rechtsschule zu Bologna, 1888, and elsewhere. He has recently edited a Summa Codicis (1894) and some Quaestiones de iuris subtilitatibus, both of which he ascribes to Irnerius. See also Pescatore, Die Glossen des Irnerius, 1888; Mommsen, Preface to two-volume edition of the Digest; Flach, Études critiques sur l'histoire du droit romain, 1890; Besta, L'Opera d' Irnerio, 1896; Ficker, op. cit. vol. iii, and Conrat, op. cit. passim.

catechisms were compiled [1]; but of anything that we should dare to call an education in Roman law there are few, if any, indisputable signs before the school of Bologna appears in the second half of the eleventh century. As to the Digest, during some four hundred years its mere existence seems to have been almost unknown. It barely escaped with its life. When men spoke of 'the pandects' they meant the Bible [2]. The romantic fable of the capture of an unique copy at the siege of Amalfi in 1135 has long been disproved; but, if some small fragments be neglected, all the extant manuscripts are said to derive from two copies, one now lost, the other the famous Florentina, written, we are told, by Greek hands in the sixth or seventh century. In the eleventh the revival began. In 1038 Conrad II, the emperor whom Cnut saw crowned, ordained that Roman law should be once more the territorial law of the city of Rome [3]. In 1076 the Digest was cited in the judgment of a Tuscan court [4]. Then, about 1100, Irnerius was teaching at Bologna [5].

Here, again, there is room for controversy. It is said that he was not self-taught; it is said that neither his theme nor his method was quite new; it is said that he had a predecessor at Bologna, one Pepo by name. All this may be true and is probable enough: and yet undoubtedly he was soon regarded as the founder of the school which was teaching Roman law to an intently listening world. We with our many sciences can hardly comprehend the size of this event. The monarchy of theology over the intellectual world was disputed. A lay science claimed its rights, its share of men's attention. It was a science of civil life to be found in the human, heathen Digest [6].

A new force had begun to play, and sooner or later every body of law in western Europe felt it. The challenged church answered with Gratian's Decretum (circ. 1139) and the Decretals of Gregory IX (1234). The canonist emulated the civilian, and for a long while maintained in the field of jurisprudence what seemed to be an equal combat. Unequal it was in truth. The Decretum

[1] See E. J. Tardif, Extraits et abrégés juridiques des étymologies d'Isidore de Séville, 1896.

[2] Conrat, op. cit. i. 65.

[3] M. G. Leges, ii. 40; Conrat, op. cit. i. 62.

[4] Ficker, Forschungen, iii. 126, iv. 99; Conrat, op. cit. 67. Apparently the most industrious research has failed to prove that between 603 and 1076 any one cited the Digest. The bare fact that Justinian had issued such a book seems to have vanished from memory. Conrat, op. cit. i. 69.

[5] In dated documents Irnerius (his name seems to have really been Warnerius, Guarnerius) appears in 1113 and disappears in 1125. The University of Bologna kept 1888 as its octocentenary.

[6] Esmein, op. cit. 347: 'Une science nouvelle naquit, indépendante et laïque, la science de la société civile, telle que l'avaient dégagée les Romains, et qui pouvait passer pour le chef-d'œuvre de la sagesse humaine . . . Il en résulta qu'à côté du théologien se plaça le légiste qui avait, comme lui, ses principes et ses textes, et qui lui disputa la direction des esprits avides de savoir.'

is sad stuff when set beside the Digest, and the study of Roman law never dies. When it seems to be dying it always returns to the texts and is born anew. It is not for us here to speak of its new birth in the France of the sixteenth or in the Germany of the nineteenth century; but its new birth in the Italy of the eleventh and twelfth concerns us nearly. Transient indeed but all-important was the influence of the Bologna of Irnerius and Gratian upon the form, and therefore upon the substance, of our English law. The theoretical continuity or 'translation' of the empire, which secured for Justinian's books their hold upon Italy, and, though after a wide interval, upon Germany also, counted for little in France or in England. In England, again, there was no mass of Romani, of people who all along had been living Roman law of a degenerate and vulgar sort and who would in course of time be taught to look for their law to Code and Digest. Also there was no need in England for that *reconstitution de l'unité nationale* which fills a large space in schemes of French history, and in which, for good and ill, the Roman texts gave their powerful aid to the centripetal and monarchical forces. In England the new learning found a small, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma. But all this we shall see in the sequel.

F. W. MAITLAND.

THE WAGE OF LAW TEACHERS[1].

I HOPE it is not improper or indelicate to consider here the compensation accorded to persons engaged in the teaching of Law.

All men in the beginning and most men in every stage of society depend upon their earnings for their livelihood; nor can it be commonly said that those who have escaped this dependence have proved more useful to mankind than their fellows, chained to their tasks by necessity. It would be a very narrow way of looking at the matter to consider that it affected the individual welfare of the teacher alone, and to omit to consider its controlling effect on the constitution of the faculty and the character of the instruction as well.

When Edmund Burke addressed to the House of Commons his famous observations on the conciliation of America, he declared of our thirteen colonies: 'In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful and in most provinces it takes the lead.

'The greater number of the deputies sent to Congress were lawyers. . . .' Again, 'But all who read, and most do read, obtain some smattering in that science.' 'I have been told by an eminent bookseller that in no branch of his business, after tracts of popular devotion, were so many books as those on law exported to the plantation. The Colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England.' Those traits which the most philosophic observer in Europe discovered in our forming nation, are constant after the lapse of 122 years.

Still we may say of the bar 'in most provinces it takes the lead.' The successful and the unsuccessful nominees for the presidency are of the brotherhood still, and 'the greater number of the deputies sent to Congress' remain 'Lawyers.'

It seemed then worth while to consider the provision for training men to whom their countrymen confide so much, among other

[1] A Paper read before the Section of Legal Education of the American Bar Association, by Charles Noble Gregory, A.M., L.L.B., Professor and Associate Dean in the College of Law, University of Wisconsin, Member of the General Council and the Executive Committee of the American Bar Association.

ways, in respect to the salary list of law schools and as to the wage of law teachers.

Circular letters were accordingly sent to eighty-one law schools in the United States, being all those listed in the proceedings of this Section for 1896, for which an address could be found, and all additional schools reported by the United States Commissioner of Education. These letters asked for information as to the number of teachers in each, and as to how many gave their entire time, how many were in practice and how many on the bench; also for information as to the pay of law teachers, and as to their relative compensation as compared with those employed in other departments and with the salaries of judges and the incomes of practising lawyers in their several communities. Written replies were received from a large number and from others printed catalogues only, which gave no information on these subjects except as to the number of teachers employed. Many made no reply. The written replies, however, included the principal schools and may fairly be taken as representative. Kentucky University at Lexington, Ky., which advertises four colleges, 'Arts, Bible, Law, Commercial,' replies that it has no longer a law department. Yale Law School and New York University neither of them care to communicate their scales of compensation. Columbia College Law School reports that it has no settled rate, but the salary of each teacher is a matter of agreement with him. One or two schools desired the facts given to be discussed impersonally. In the main, however, the law schools, which seem to be public or semi-public institutions, reported quite as frankly as could be desired, and the showing is not without interest. The reports received from 349 law teachers in the country show 75 giving their entire time to their schools and 274 who occupy themselves with other gainful occupations, mainly the practice of law; but 35 of these last are judges on the bench. That is, 21·49 per cent. of the law teachers heard from give their entire time, and 78·51 per cent. have other avocations. In round numbers, one-fifth give their entire time, four-fifths do not. This means that four-fifths have their main hopes and ambition, their main career at the bar or on the bench; that one-fifth have no career, ambition, or occupation, except in these schools of law, or possibly in the closely connected occupation of legal authorship. As nearly as could be ascertained from the reports, the aggregate compensation either in fixed salaries or positively estimated fees of the 68 of these teachers giving their entire time, whose compensation is reported, is $174,360, making the average for each $2,564·12 (approximately £512 3*s.* 6*d.* sterling). This includes on the one hand the deans or heads of departments charged with

executive as well as instructional duties who often receive $1,000 to $1,500 more than the other professors, but it also includes the assistants employed at small salaries.

The writer was recently informed of a southern law school where there were five professors advertised. On investigation it proved that there were five lawyers in the town where it was located, and each was a titular professor. There was, however, but one student, and he was a teacher in another department of the same institution. Two southern schools (those of the Universities of the South and of South Carolina) have but one law teacher each. Two have but two each (Cumberland and Georgia). Many have but three, but they commonly give their entire time as at the Universities of North Carolina, Virginia, Washington and Lee, West Virginia, and Texas.

Enormous faculties are reported, particularly from law schools in large cities, where the faculty are often all in active practice, and give but a very limited part of their time to the school. The largest number, thirty-five, is reported by Boston University Law School. The compensation of these teachers who give but a part of their time is extremely various. From one western school the dean reports that he owns the buildings and pays the other teachers, and pays a percentage to a State Normal College to permit him to operate as one of its departments. That he makes about the same annual profit as the salary of a Circuit judge, which, I find, in his state is $2,500. In a few of the schools the teachers receive no pay, being lawyers who undertake the labour from public spirit, as physicians so often give gratuitous instruction in medical schools. In others the fees received are first devoted to the payment of the expenses of the school, and the residue divided among the instructors in proportion to the work done by them. The lowest payment by the hour reported is $5·00, and the highest $20·00 per hour, the latter at the University of Nebraska; or $50·00 per 'session' in some cases at Chicago College of Law.

The report from Harvard Law School is most complete, and the success of the school argues well for its systems and organization. There we find a compact faculty of nine men, all but one giving their entire time to the school, and he gives to it most of his time. The salary of an assistant professor is $2,250; of a professor, $4,000 during the first five years, $4,500 during the next five years, and $5,000 thereafter. [This scale—£350 to £1,000—answers nearly to that of English Universities, taking college lecturers, University 'readers,' and professors together.]

In general the report is that the law teachers who receive fixed salaries are somewhat more highly paid than the teachers of other

topics, even in the same university. This seems true, for instance, in the Universities of Colorado, Cumberland, Harvard, Iowa, Minnesota, North-Western, Pennsylvania, and Texas. In many universities the salaries are the same. There are higher salaries paid professors in the other departments than any professor's salary in the college of law in one western university, which is alone in this, so far as the replies show. The obvious reason for the higher compensation of law teachers, in many instances, is found in the competition of bench and bar, both better paid than teachers, for competent men learned in the law, and perhaps in the fact that the higher average age of the law students and size of the classes make special demands on the law teachers. The law students, too, in most schools pay far larger fees than undergraduates. In fact there is a disposition in many universities to support other branches of education by liberal appropriation from the general income, but to expect the department of law to be self-sustaining and sometimes, as at Michigan University, to contribute largely to the support of less lucrative branches. Considering how predominant lawyers are in our official life and therefore how important, not only to themselves but to the public, it would seem as little politic as just that a peculiarly parsimonious policy should be followed in making provision for their training and education.

In response to some 49 circulars sent to the leading European Law Schools, reports were received as to 155 law teachers engaged in them. Of these 89 give substantially their entire time and 66 do not. That is, 57·42 per cent. give their entire time and 42·58 per cent. have other occupations, showing that nearly three times as large a proportion so give their entire time as in the American Law Schools. The faculty of law in the Continental Universities is compensated apparently exactly as the other faculties.

Prof. De Harley of the University of Amsterdam writes a most careful and interesting letter, from which it appears that in the department of law of that institution there are included six ordinary professors who give their entire time, and one who acts 'simultaneously' as a notary, and one as a practising lawyer. The compensation is a salary equivalent to $1,800 for the first five years, to $2,000 for the next five years, and $2,200 thereafter. In addition each professor receives a further sum, usually about $40 per annum, for 'every hour that weekly is bestowed in lecturing,' as he expresses it. At the age of seventy the professor is retired with an annuity proportioned to the time he has remained in office. He writes that judges receive from $1,200 to $3,600 in his country.

At Bern, in Switzerland, the ordinary law professor gets 5,000

francs from the state and 1,500 to 2,000 francs in fees from the students, making his compensation about equal to $1,300 or $1,400. Judicial and professional incomes are, however, low in proportion. 15,000 francs represents a leading city practice, and in the country the scale is much less, all which speaks of the frugality and simplicity of the ancient mountain republic.

Sir Ludovic Grant writes from Edinburgh University that of seven professors of law, with three assistants and two lecturers, only one professor, at present, gives his entire time. The salaries of professors range from £600 to £900, of lecturers from £100 to £150. Mr. Maitland, Downing Professor of Law at Cambridge University, writes me that the University provides five teachers of law, the various colleges constituting the University some six or seven more. None are on the bench or in active practice. The salaries vary greatly, but £800 is the maximum.

Mr. Thomas Erskine Holland, Professor of International Law and Diplomacy at Oxford, writes that there are there employed four professors of law, two readers, and about eight lecturers. That the professors are paid from £500 to £1,200, the readers £300 to £400, the lecturers £150 to £400, that the professors are substantially debarred from practice by required residence at Oxford, that judges of the High Court are paid £5,000, and practitioners earn from nothing to £20,000 per year. Sir Frederick Pollock writes from Lincoln's Inn that the Inns of Court employ six readers and four assistant readers. The readers are paid £500 and fees, of the amount of which there is no available information, and the assistant readers, he believes, £350. They are all free to take private practice, and rather more than half of them are in fact active practitioners. This is the provision which these inscrutable institutions, which still control admissions to the English bar, make for legal education out of their splendid income, always concealed, but estimated by the late Lord Chief Justice Coleridge at £100,000 per annum. This arrangement is denounced on every side as inadequate, and one of the most eminent of the English law writers and teachers recently wrote me, from one of the inns, that these provisions for legal education would 'disgrace a second-rate American University.'

The replies from France would indicate that the salaries of law professors range from 6,000 to 11,000 francs, in Paris rising even to 15,000, and that, in this exceptional region, the law teacher is better paid than the judge, the judges' salaries being so low that they could not live upon them alone but must have private resources. The salary of the law teacher, as Prof. Appleton of the 'Faculté de droit de l'Université de Lyon' writes, 'increases

with capacity and above all with age—almost only with age in fact.'

The report from the law department of the University of Pisa, with its faculty of nine teachers, shows salaries of 5,000 to 8,000 francs for the law professors and of 3,500 to 9,000 for the judges.

The only report from a German University received, shows that the law professors who give their entire time (eight out of ten) receive an average salary of 5,100 marks, and the extras who give half their time just half as much, and some 6,166 marks in fees, seem, in addition, to be divided between nine teachers, making about 5,785 marks as the full average compensation of a teacher, whereas the salary of the Judge (*Oberlandes-Gerichtsrath*) is 6,300 marks, but little better than that of the law professor. Some very eminent teachers at the greater universities, however, receive in the fees of students attending their lectures much larger sums, and are able to command throngs of students for many successive years.

At Upsala a professor receives 6,000 kroner. Judges from 4,400 to 10,000 kroner.

We may gather from all these reports that, in the European Law Schools, a law professor is paid exactly the same compensation received by his fellow professors in other faculties. That in France he is paid more, in the Netherlands, Germany, Italy, and Sweden, but little less than the judges. That in England the higher judges are paid more than four times the salary of the best paid law professors. That everywhere the earnings of the leaders of the bar exceed many times over the pay of bench or faculty. That, in this country, in the best established schools, a professor, giving his entire time, is paid $4,000 to $5,000, and there seems a tendency in them to make the compensation of the dean and of the full professors much the same. In a large number of important schools the professors' compensation is $2,500 to $3,000, and the dean or head of the school often receives $3,500 to $4,000.

Now though the common law courts have often repudiated from the law of sales the doctrine that a sound price requires a sound article, yet the fact remains that an adequate income is a great factor in drawing competent men to any occupation. Thus, those two great events in law teaching, the delivery of Blackstone's lectures at Oxford and Story's at Harvard, were the direct first results of, for those days, liberal endowment. Viner gave £12,000, the profits of his abridgement of law, to Oxford to aid the study of law, and Dane gave the profits of his abridgement, in like manner, to Harvard. Blackstone's Commentaries were the first product of one, and Story's Equity Jurisprudence of the other.

For good or ill the English law is grafted permanently on all great English-speaking communities. It is an intricate law, having its growth and development almost as a living organism. It has not been created by any one man, age, or group of men. For good or ill the lawyers are, and have been from the beginning, a dominant factor in the public life of this nation. It seems then plainly a matter of the highest public concern that their training should be exacting and adequate. At least 10,000 students are now enrolled in the law schools of this country. Their instruction ought not to be wholly left to the scant remnants of time which busy, practising lawyers snatch from their clients, nor to those who, having failed at the bar, see written over the door of the teacher, 'Who enters here leaves hope behind,' and yet enter that abode of 'departed spirits' from a sad necessity. The law teacher ought not to be expected to take vows of poverty and obedience and to devote himself to cultivating the science of the law upon 'a little oatmeal,' to borrow Sidney Smith's paraphrase. It is the suggestion of Chancellor Emlin McClain of the State University of Iowa, and of Prof. Wambaugh of Harvard, that the head of a department of law should receive the salary of a judge of the highest court of his state, and a full professor at least that of a judge of the district court of his state. Virginia has already passed that standard, paying her full law professors the same salary she gives her judges of the Court of Appeals, and, moreover, giving the professor in addition an official residence. The old dominion has given us many good memories and examples. We might well imitate her example in recognizing the fact that students of law ought to take their learning from as well equipped men as the judges to whom the bar of the state submits controversies. The dean of an important eastern law school writes me, 'It is our thought, in electing a young man as professor, to copy the Harvard plan of progressively increasing his salary, beginning at $3,000 and ending at about $5,500. Unless social conditions change, $5,500 would represent an income which would enable the professor to marry and move in any circle of society which he desires. He will not be a rich member, but still the sum will enable him to live decently.' That seems to me to express what we ought to hope for and to ask, 'Neither poverty nor riches,' but such stipends as will enable us to frequent the company of cultivated people in our several communities without gaunt cheeks or threadbare coats, and to live in modest decency. That which is reasonable it is right to ask, and that which is reasonable, when duly asked, the world, with all its unreason, is apt to accord.

Forty-five years ago Prof. Jowett, the reforming head of Balliol,

wrote: 'As University reformers we must appear to the world rather as seeking an intellectual aristocracy, or to express it more coarsely, to form good places for ourselves out of the revenues of the college, than earnest about anything which the world in general cares for or which can do any extensive good.' Some misunderstanding of the kind indicated must be anticipated, but if we do not discuss this question affecting not only our own welfare but equally the welfare of the interests confided to us, no one will. A parsimonious policy toward the teacher of law, while bench and bar compete with schools of law for the time of competent men, results in the deterioration of the law faculty by a process of natural selection.

The record of our earliest school of law, that of Litchfield, Conn., founded in 1784, discontinued in 1833, where out of 1,023 graduates, 50 became members of Congress, 15 U. S. Senators, 40 Judges of the Higher State Courts, 10 Governors of States, 5 Cabinet Officers, 2 Justices of the Federal Supreme Court, 1 Vice-President, and several foreign ministers, is thoroughly typical. Our law schools are distinctly the training schools for public life and their proper maintenance is especially a public question and a public necessity. The fact that the best of them, even now, are confessedly superior to any English schools of law was admitted by the most eminent English masters, Sir Frederick Pollock, Mr. Bryce, and Prof. Dicey in their testimony before the Royal Gresham Commission, and this encourages us to believe that a more liberal support of the weaker schools might advance them to equal usefulness. The dignity, continuity, and independence of the work has quite as much to do as the salary with attracting men of a high type, and none of these factors can be disregarded. Whatever hampers or humiliates a deserving teacher tends to drive the best men from the faculty and to leave an inferior residuum to fill their place. Great teachers make great schools. The average attendance at Harvard Law School had sunk to *one* when Story began his lectures there in 1829, and it rose to thirty within the year, and, ere death took him, he left it a great national school. His compensation was $1,000 a year, which was, in those days, a very handsome addition to his judge's salary. Chancellor Kent writes rather ambiguously, when on retirement from the bench he was given a professorship at Columbia, 'I had no salary, but I must do something for a living,' but his Commentaries had in 1853 netted him and his heirs more than $120,000.

I learned recently that a western university had spent in the past year on its department of Agriculture $78,000, almost wholly from appropriations, and on its department of Law, having about

the same number of students and giving far more extended instruction, $14,000, and this last sum was almost wholly derived from the fees of its law students.

I mentioned this to some of its faculty, and expressed my pleasure at the liberal support of the science of agriculture and my hope that the science of law might at some time be as well maintained. They pointed out, with some heat, the usefulness of the Agricultural School, and said one of its professors had invented a convenient apparatus for testing milk. I was glad of this excellent achievement. I recalled that one of the law professors had published an able work on Evidence (a convenient apparatus for testing truth) and intimated that a good quality of justice was as important as a good quality of milk.

Lord Chief Justice Russell's pregnant remark made to us last year, 'That Justice and its administration are amongst the prime needs and business of life,' has remained with me ever since. I am sure we have many of us pondered it and quoted it. No one can deny its far-reaching truth, and, that being so, the training of bench and bar, sole ministers of justice as they are, cannot be too well provided for. I think the large and wise observation of the Lord Chief Justice will commend itself to a far wider circle than that of Mr. Cock, Q.C., who has lately said that 'a good voice, a good temper, and a knowledge of the judges are the main things for success at the bar.'

The ideals toward which we look and for which our law schools are maintained I hope are rather 'that prime need and business of life,' trained and enlightened justice. I hope and believe that they will not be denied adequate support, that they will not be asked to content themselves with a mean or grudging maintenance, and that in providing for the training of the lawyer it will not be forgotten that in every free and civilized community he has been found, in the words of D'Aguesseau, 'AS NECESSARY AS JUSTICE.'

CHARLES NOBLE GREGORY.

WILLS IN ANCIENT EGYPT.

WHILE the ruins of Babylonia have furnished endless collections of legal documents of all periods and of considerable variety — all written on clay — Egypt has been comparatively unproductive of such records. It is true that large numbers of demotic contracts and other business documents of the Greek period, written both in Greek and in demotic, have come down to us, and many of them have been published, especially in the writings of M. Revillout. But the further back we penetrate the fewer are the contemporary records on perishable papyrus: generally speaking, business papers are not preserved carefully in tombs. Nevertheless, from year to year and from various sources a certain number of these are brought to light, and occasionally also the record of some important transaction is found engraved on stone.

Hitherto—apart from a batch of reports on certain criminal investigations of about 1200 B. C.—the most valuable discovery of legal documents on papyrus has been that made by Flinders Petrie in 1888–89 near the mouth of the Faiyûm, a district where conditions seem to have been exceptionally favourable to the preservation of papyri. From Kahun, the site of a ruined town of the twelfth dynasty rich in domestic remains, the excavator obtained a large collection of fragmentary household archives representing almost every class of record usually committed to writing — literature, deeds, inventories, prescriptions, letters private and official, ready-reckoners, accounts, &c. This unique collection was intrusted to the present writer to sort and to edit. The papyri were extremely fragile and in many cases reduced to the merest scraps; a few, however, were legible, and some documents could be in great part restored from their fragments. Such a collection, so far as it is intelligible, illustrates Egyptian civilization of about 2500 B. C. from a new point of view.

There are now in course of publication forty facsimile plates of these papyri, and of a few from Gurob, the site of an eighteenth-dynasty town of which the ruins were worked by Petrie at the same time as Kahun. The legal documents from Kahun occupy

five plates; but, though few in number, they are of quite exceptional interest, as scarcely anything of the kind had hitherto been known earlier than the demotic papyri of the twenty-sixth dynasty. They belong to three classes: I. The *wpwt*: a kind of census list of a household. II. *'rmt. pr.*: a title deed to, or disposition of property, in the present instances apparently a kind of will. III. The *swnt*: apparently an agreement for services and their payment; but this class we here only mention.

I. The census lists give the name of the head of the household, accompanied by a numeral; the names of his wife and any female relatives living with him, such as widowed mother and sisters; and where there were slaves these also were recorded. Few males are mentioned, and these appear to be infants, or at least very young children. The grown males, whether of the family or slaves, would be called out for various services, and so would be entered on other government lists, such as certain lists of labourers and officials actually found at Kahun; the youths would be in training for military or civil employment. The household lists were apparently made whenever, by the death of the father, the son came to be the head of the family, or whenever any considerable addition was made to the household. There are indications, too, that on the accession of a new king the head of the household had to swear fealty, and that the exacting of the oath in the court of the wazîr was duly noted. In the case of a poor household the list was drawn up in one or another of the government offices; for important establishments probably a scribe was told off to make the list on the spot. In the family of a military man we find remains of lists as follows:—

a. A soldier, Tehuti, is killed, or at any rate dies: his household is enumerated and his will or disposition of affairs is quoted (very fragmentary).

b. The soldier, Hera, son of Tehuti, numbered 100, with his wife and infant son, are enumerated: the list is made in the presence of certain officials in the court of the wazîr. (On the back of the last papyrus.)

c. The widow of Tehuti and his five unmarried daughters—two of them infants—are added to Hera's household in a new list where Hera is still numbered 100.

(Probably all three lists were made after the death of Tehuti, *a.* and *b.* showing the two separate households at the time of Tehuti's death, and *c.* giving them in combination after the destiny of the widow and orphans had been determined. Dates, and much besides, have unfortunately gone from these documents.)

d. Hera dies or is killed: his household is reckoned up.

e. A statement concerning Senefru, Hera's younger son, probably setting forth that he is a minor without family.

f. List of the household of Senefru as a minor, without any number attached to his name; the occupation—though not the number—of his deceased father is also stated. This list is the best preserved of any, and runs as follows:—

'Year 3, 4th month of Verdure, day 25, under the majesty of the King of Upper and Lower Egypt, Sekhem-ka-ra, living for ever to eternity. Copy of the specification of the persons of the household of the soldier, Hera's son Senefru, his father having been in the second (?) of the established trained bands, Northern Division:

his mother, Sat-Sepdu's daughter, Shepset, priestly woman of Gesab.

mother of his father, Harekhni,
sister of his father, Katsenut,
sister of his father, Isis,
sister of his father, Sat-Senefru,
} wards (?) of the guild (?) of the necropolis workmen of the Northern Division.

There was an entering (into court) with the specification of the persons of his father's household of the year 2. This household (?) took oath (of allegiance?) in the office of the wazîr in the year 5, first month of Winter, day 8 . . . under the seal of . . . .

Made in the Office of Land of the Northern Division, in the presence of the Great One of the Southern Tens, Mentuemhat, son of Merkhent,

by the steward of the accounts of oxen, Senbni,
the scribe of the Council, Senbef, son of Aa (?),
. . . . . .
the scribe of the army, Sanehat,
} Northern Division.'

A much more imposing document is furnished by the specification of the household of a priest at the pyramid of Usertesen III, dated in the first year of Sekhem-khu-taui-ra, of the thirteenth dynasty. It first names the priest, and his son and daughter—probably both young and unmarried, though apparently their mother was dead. After the family come thirteen slaves attached to the office of this priest, and three slaves who had apparently been given to him by a high-born friend or relative in the year 40 of Amenemhat III; then follow at least five slaves obtained from his paternal aunt, probably by will. If the papyrus were complete doubtless we should find the list continued. The priest bears the number 947, and he took the oath (of allegiance?) in the 3rd year. Probably this was in the 3rd and last year of Queen Sebek-nefru, during the last days counted to her rule, and before Sekhem-khu-taui-ra's

reign had fairly begun—unless indeed oath and date refer to the priest's oath of loyalty on his appointment to office.

II. We now come to the interesting subject of wills. The documents which I have to submit bear no evidence on the face of them that they are wills: they do not describe the testator as being about to die, nor name executors for carrying out the disposition of his property. Yet it seems pretty evident that the contents do not refer to gifts, but to dispositions of property in old age and in view of death. Happily the Kahun examples of such documents are practically perfect, and the translations of them are here given in full.

1. 'Year 39, 4th month of Verdure, day 19. Title to property made by the regulator of the corps. Antef's son Mery, called Keba, for his son, Mery's son Antef, called Iusenb:

I am giving my regulatorship of priestly orders to my son, Mery's son Antef, called Iusenb as (?) "old-man's-staff," even as I grow old: let him be promoted (thereto) at this instant. As to that title to property that I made for his mother before, it is annulled. As to my house that is in the territory (?) of Het . . . ., it is for my children borne to me by Nebt-Hunen-seten, the daughter of the attendant of the land-surveyor (?) Sebek-emhat, with all that is in it.

Name list of witnesses in whose presence this title to property was made:—

the regulator of the corps, Senuset's (?) son, of the same name (?)
the priest (?), Usertesen's son Senbubu . . ;
. . . . . .

2. 'Copy of the title to property made by the devoted servant (?) of the superintendent of works, Ankhren.

Year 44, 2nd month of Harvest, day 13. Title to property made by the devoted servant of the superintendent of works, Shepset's son Ahysenb, who is called Ankhren, of the Northern Division.

All my property in marshland (?) and town is for my brother the priest in charge of the corps of Sepdu lord of the East, Shepset's son Ahysenb, who is called Uah; all my slaves (?) are for this brother of mine.

This was deposited in copy (?) at the office of the second registrar (?) of the South, in the year 44, 2nd month of Verdure, day 13.'

3. 'Year 2, 2nd month of Verdure, day 18. Title to property made by the priest in charge of the corps of Sepdu lord of the East, Uah:

I am making a title to property to my wife, the woman of Gesab, Satsepdu's daughter Sheftu, who is called Teta, of all things

given to me by my brother, the devoted servant of the superintendent of works, Ankhren, as to each article in its place of everything that he gave me. She shall give it to any she desires of her children that she bears (has borne?) me. I am giving to her the Eastern slaves, four persons, that my brother the devoted servant of the superintendent of works, Ankhren, gave to me. She shall give them to whomsoever she will of her children. As to my tomb, let me be buried in it with my wife, without allowing any one to move (?) earth to it. Moreover, as to the apartments that my brother, the confidential servant of the superintendent of works, Ankhren, built for me, my wife dwelleth (shall dwell?) therein, without allowing her to be put (forth) thence on the ground by any person. [*In another hand*] It is the deputy Gebu who shall act as guardian of my son [*lit.* be child educator to my son].

Name-list of the people in whose presence these things were done:

decorator (or polisher?) of columns, Kenen,
doorkeeper of the temple, Ankhetfi's son, Apu,
doorkeeper of the temple, Senb's son, Senb.

No. 2 is on the same document as No. 3, and is merely the recital of a will relating to the same property as No. 3. We may also note that in a document of Class III, i. e. in a *sunt* or formal memorandum of a premium paid for services, which is dated prior to the documents just quoted, the two brothers mentioned in Nos. 2 and 3 receive—apparently on their appointment to office—four foreign female slaves.

The expression 'old-man's-staff' which occurs in No. 1 is not otherwise unknown, but it is difficult. Here as elsewhere it indicates apparently the appointment of a son to association with his father in office, that he may lift the burden of the work off the shoulders of the older man, an arrangement which is evidently to take effect during the testator's lifetime. Again, No. 3 might possibly be an arrangement in view of marriage. In fact, it must be left to specialists in the history of law to decide on the true nature of all the documents in Class II. It seems, however, very probable that wills should have been recognized in Egypt at a very early period. Egyptian ancestor-worship, or cult of the dead, arising out of the belief that it was eminently desirable for the dead to have the enjoyment of offerings, led rich men to endow for the service of their manes priests who should in perpetuity make offerings to the deceased founder with all due ritual on the many recurrent feast-days. Such provisions would presumably not come into force until after the death of the founder, who sometimes made the most elaborate dispositions and contracts with local priesthoods for perpetual supplies. Among demotic documents, strange to say, no instances of wills have been discovered, though Professor

Mahaffy has found very clear instances of the same in Greek papyri of the third century B. C. This year a granite stela of the twenty-second dynasty has been found in the temple of Karnak by M. Legrain, inscribed with a remarkable decree which has been translated by Professor Erman. By this decree the god Amen assigns the lands purchased by a certain high-priest Euwerot—particulars of those lands and even of the amounts paid for them being duly recorded—to a certain son of his named Khaenwese, and to the latter's sons and heirs, to the exclusion of all other descendants of Euwerot. This is practically the will of a man who has acquired a large landed estate which he desires to be kept intact. Other examples exist of similar divine decrees regarding the estates of high-priests (see *Zeitschrift für Aegyptische Sprache*, XXXV, pp. 19 et seq.). They conclude with threats of divine vengeance against those who should violate the decree, and were evidently promulgated by the high-priests during lifetime to throw the aegis of divine protection over their testamentary dispositions.

As a sample of the system of tomb endowments we may take extracts from a long inscription in the tomb of Hapizefa at Siut, consisting of the command to the '*Ka*-priest' and ten contracts made by the deceased nomarch and high-priest with the local priesthoods for funerary supplies and ceremonial visitations. The heading is, 'Decree of the hereditary prince the nomarch, the chief priest Hapizefa.'

'The hereditary prince, &c., Hapizefa: he says to his *Ka*-priest, "Behold! all these (undermentioned) things which I have contracted for with these (undermentioned) priests are under thy care: behold! it is indeed the *Ka*-priest of a man who establishes his services, who establishes his food-offerings.

"Behold! I have informed thee of those things which I have given to those priests in exchange for those things which they have given to me: beware lest any of them be diminished. Let all that was said concerning my things which I gave to them be told to thy son or thine heir who shall perform for me (the duties of) a *Ka*-priest.

"Behold! I have endowed thee with lands, people, cattle, gardens (?) and all things, like any noble of Siut, of desire that thou mayest do for me things of thy heart (i. e. heartily). Worthy is thy position with regard to all my things which I have placed in thy charge. Behold! it is before thy face in writing.

"Now the (undermentioned) things shall belong to that one son of thine whom thou shalt wish to act as my *Ka*-priest from among thy children—even as food which he swallows himself, without allowing him to divide them among his children—according to this statement which I have caused thee to hear. Behold!"'

(Here follow the ten contracts.)

Second Contract.

'SEALED CONTRACT made by the nomarch, the chief priest Hapizefa, deceased, with the hour-priests of the temple of Upuat, lord of Siut:

THAT THERE BE GIVEN UNTO HIM a white loaf by each of them to his statue which is under the care of his *Ka*-priest, on the 1st day of the 1st month of the season of Verdure, i.e. New Year's Day, when the house makes gifts to its lord, after the striking of fire in the temple.

And that they go forth (in procession) behind his *Ka*-priest, giving him power in heaven (by recitations) until they reach the northern corner (?) of the temple, as they do in reciting for their own blessed dead on the day of striking fire.

HE GIVING UNTO THEM FOR IT a *heqt* measure of Northern barley from (?) each holding of the endowment estate, of the best (first-fruits?) of the harvest of the nomarch estate, as is done by every commoner of Siut from the best of his harvest. For he it is that takes the initiative in causing each of his cultivators to give it to this temple from the best of his holding.

THEN HE SAID, "Lo! ye know that when anything is given by any noble or by any commoner to the temple, of the best of his harvest, it is not pleasing unto him that it should be diminished. And no nomarch in his time sets at nought the sealed contracts made by another nomarch with the priests in their time.

Moreover, this Northern barley belongs to the hour-priests of the temple, each for himself, i.e. to every priest who shall give to me this white loaf, and it shall not be assigned to those who are in their monthly rotation, for this white loaf is given by them each man for himself."

THEREUPON THEY AGREED TO IT.'

Third Contract.

'SEALED CONTRACT made by the nomarch, the chief priest Hapizefa, deceased, with the corporation of the temple.

THAT THERE BE GIVEN UNTO HIM bread and beer on the 18th day of the 1st month of the season of Verdure, i.e. the day of the Uag feast. [Here follows a table of the amounts to be given by the different officials]

HE GIVING UNTO THEM FOR IT twenty-four temple-days of his property, his paternal estate, not of the property of the nomarch estate:

To the chief priest, four days.

To each one of them, two days.

THEN SAID HE UNTO THEM, "Lo! a temple-day is $\frac{1}{360}$ of the year: and if ye divide all the daily incomings of this temple in bread, beer and flesh meat, this makes $\frac{1}{360}$ of the bread and beer and all the incomings of this temple for each of these temple-days which I give unto you.

Behold! it is my property, my paternal estate, it is not from

the nomarch estate, for I am the son of a priest, even as each of you.

Behold! these days recur to every (successive) corporation of this temple that shall be, from the fact of their providing me with this bread and beer which they have given unto me."

THEREUPON THEY AGREED TO IT.'

The question of wills in early Egypt is now opened, if in a somewhat informal manner, and the case is strong enough to demand thorough investigation, although unfortunately the materials for such an inquiry are but slight. The above translations and notes, imperfect as they must be in the present state of our knowledge of the language and customs of the country, may still serve to introduce the subject to students of legal history.

F. LL. GRIFFITH.

PREFERENTIAL DEBTS OF RAILWAY RECEIVERS.

IN a former number of this REVIEW[1] the administration of American railways by receivers appointed during foreclosure suits was considered at some length. It was shown that the powers exercised by the courts through such officers are in some respects much more extensive than those of the mortgagor companies themselves, the accepted doctrine being that the lien of the mortgage may be postponed, not merely as regards the income, but even as regards the *corpus* of the estate, to any expenses which may be incurred during the receivership for the purpose of keeping up the business as a going concern. Some reference was also made to the still more remarkable displacement of legal rights which results from the enforcement of the rule that certain classes of the mortgagor's unsecured debts outstanding at the time the receiver is appointed may be accorded a like preference; but no attempt was made to develop this branch of the subject. That courts of equity have, in this instance, modified their usual practice is a fact which has impressed itself, by the teachings of a painful experience, upon the minds of a large number of European bondholders. No professional assistance is necessary to enable the *simplicitas laicorum* to appreciate the new rule in at least one of its aspects. The primary and immediate effect of its operation, the diversion of assets which, in the case of an ordinary estate, would belong absolutely to the mortgagees from the commencement of the receivership, is readily understood, and this circumstance is the less likely to be misapprehended as it affects a class of creditors whose security has usually exhibited a 'strange alacrity' in shrinking, when its value has been subjected to the test of a judicial sale. But the true meaning and scope of the rule which produces these results is, we believe, very imperfectly realized, even by lawyers, anywhere outside the United States. It is hoped, therefore, that an analysis of the subject will be neither unwelcome, nor uninteresting, to the readers of this REVIEW.

The mortgage by which railway bonds are secured in the United States is almost invariably in the form of a trust-deed, by which the trustee takes a defeasible title to the whole property, real and

[1] Vol. iv. p. 300.

personal, which belongs to the mortgagor at the time the instrument is executed, or which may thereafter be acquired by it for the purposes of its business. The provisions which comprehend the latter description of property are familiarly termed the 'after-acquired property clauses.' The income derived from operation of the railway is, as a general rule, specifically subjected to the lien. But the language of the instrument in this regard has no material bearing on the doctrine under discussion, for it is now well settled that the insertion of such words as 'revenue, earnings, income, &c.,' does not in any way modify the common-law principle that the avails of mortgaged property belong to the mortgagor, while he is rightfully in possession[1]. The deed also contains clauses which confer upon the trustee the right to enter when the interest or principal of the bonded debt is in default, and either administer the estate for the benefit of the *cestuis que trust* until the debt is paid off, or sell it outright. These powers of entry and sale are, it may be remarked in passing, unanimously held to be, as remedies, merely cumulative upon that right of foreclosure which is an inherent incident of every mortgage. This doctrine is of no small importance to individual bondholders, as it is usually provided that the more summary remedies shall be exercised only at the request of a majority of the bondholders, and, if the specific mention of these remedies were held to oust the courts of their ordinary jurisdiction, the minority would frequently be left without any means of enforcing their lien.

If the subject-matter of such a deed were an ordinary estate, it is plain that the relations of the lienors and the unsecured creditors could not, upon any principle recognized by general equity jurisprudence, be affected by the form of the remedy which might be selected for the purpose of enforcing the mortgage, nor by the fact that a receiver might or might not be appointed at the instance of the petitioners. The priority of the mortgage lien would remain absolute as regards the *corpus*, whether the proceedings taken to realize the security were by way of foreclosure or under the powers reserved to the trustee; while, as regards the income, such priority would take effect from the moment any one, whether in the exercise of the specific contract rights or by the appointment of a court, became entitled to administer the property for the benefit of the mortgagee. These propositions are only partially true, where the mortgaged estate is a railway. The nature of the relief asked for has then a very material influence on the rights of the various parties in interest.

A court of equity, in which suit is brought for the specific

[1] *Gilman* v. *Illinois &c. Tel. Co.*, 91 U. S. 603.

enforcement of the trusts created for the benefit of the bondholder, does not consider itself at liberty to modify the operation of the deed. Its functions are limited to seeing that the trustee is duly put in possession, and administers the estate faithfully. Unsecured creditors, therefore, whose claims may be outstanding when the trustee takes or demands possession will be rigorously postponed to the bondholders, as to the income which subsequently accrues, and *à fortiori* as to the *corpus*[1].

If a foreclosure suit is instituted, and no receiver appointed, the rights of the bondholders remain the same as they were before the commencement of the proceedings. The priority of the mortgage stands good as to the *corpus*, and the mortgagor, being still left in full control of the property, may voluntarily devote any part of the income to the payment of unsecured debts, or may be compelled to do so by proceedings *in invitum*[2].

If the mortgagees not only foreclose, but ask for a receiver, an entirely different set of principles will come into play. Possession taken by a receiver in their behalf does not place them in the same advantageous position as the possession of the trustee. Neither as to the *corpus*, nor as to the income, will unsecured debts outstanding at the beginning of a receivership be postponed, in all cases and as a matter of course, to the lien-debt. How far courts of equity, in dealing with railways under such circumstances, have departed from their usual practice will be seen from the subjoined statement of the rules which are now regularly applied by the Federal and State Courts. They are formulated, as far as possible, in the words used by the judges themselves.

'I. When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during such receivership, of outstanding debts for labour, supplies, equipment, or permanent improvement of the mortgaged property as may under the circumstances of the particular case appear to be reasonable[3].

[1] See *Fosdick* v. *Schall* (1878), 99 U. S. 235.

[2] *Galveston &c. Ry. Co.* v. *Cowdrey*, 11 Wallace 459; *Gilman* v. *Illinois &c. Tel. Co.*, 91 U. S. 603; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798; *Doe* v. *Memphis &c. Ry. Co.*, 124 U. S. 65. Compare also the extract from *Fosdick* v. *Schall*, p. 39 post. The statement which Judge Caldwell of the Eighth Federal Circuit recently made in a lecture, published in XXX. Am. Law Review (see p. 171), to the effect that unsecured debts, outstanding at the commencement of a foreclosure suit may *always* be paid in priority to the mortgage debt out of the proceeds of the sale, is certainly erroneous, for, as is shown below (p. 41), this preference is allowed only in exceptional cases, even when a receiver has been appointed.

[3] *Fosdick* v. *Schall* (1878), 99 U. S. 235, 251. Other debts not mentioned here, but entitled to a similar preference, are debts due to connecting lines growing out of an

'II. If no order for the payment of outstanding debts is made at the time when the receiver is appointed, the court may, at any time during the receivership, provide for the payment of any debts belonging to certain classes, which have been incurred within a reasonable period prior to the appointment of the receiver[1].

'III. If the court appointing the receiver considers that the non-payment of outstanding debts of certain classes will result in an absolute stoppage of the business of the railroad company, it may charge such debts upon the *corpus* of the estate[2].

'IV. If no order [for the payment] of outstanding debts of the kind specified in Rule I] is made when the receiver is appointed, and it appears, in the progress of the cause, that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labour, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This power is ordinarily confined to the appropriation of the income of the receivership, and the proceeds of the moneyed assets which have been taken from the company, but wherever it appears that the diversion has been for the purpose of defraying expenditures which have increased the total value of the property subject to the mortgage, the court is justified in effecting a restoration even out of the proceeds of the foreclosure sale[3].'

interchange of business, and debts due for the occupation of leased lines, *St. Louis &c. Ry. Co.* v. *Cleveland &c. Ry. Co.* (1887), 125 U.S. 658. To the same effect, see *Miltenberger* v. *Logansport Ry. Co.*, an extract from which is given on p. 43 post.

[1] *Burnham* v. *Bowen* (1883), 111 U.S. 776. The period within which the claim of a creditor must have accrued to be entitled to preference under Rules I and II is not fixed by any rigid limitations. In the case just cited the claim was eleven months old, and the same court has approved the allowance of one which had been outstanding three years when the receiver was appointed, *Hale* v. *Frost*, 99 U.S. 389. Upon the analogy of certain statutes, the judges who first undertook to prefer 'back-claims,' fixed a limit of six months: [*Scott* v. *Clinton &c. Ry. Co.* (1876), 6 Bissell 53] and the doctrine discussed in this article has, in consequence, come to be known among the profession as the 'Six Months' Rule.' This term, however, is misleading, as is shown by the decisions referred to above, as well as many others. It expresses the true doctrine merely to this extent, that, as it is the custom of railway companies in the United States to make up their balance sheets every half year, a creditor who allows his claims to run on for a longer period, without taking some active steps to enforce them, raises against himself a more or less strong presumption of laches. But the remissness would apparently have to be of a very flagrant nature to preclude him from obtaining relief. Judge Caldwell in the article already referred to, suggests that the equitable right to have the debt paid out of the income should not be barred short of the time that would outlaw the debt under the Statute of Limitations.

[2] *Miltenberger* v. *Logansport Ry. Co.* (1882). The debts provided for are enumerated in the extract from this case, p. 43 post.

[3] *Fosdick* v. *Schall* (1878), 99 U.S. 235, 254. The company is not bound to accumulate out of the surplus earnings of any particular interest period a fund to meet possible contingencies that may arise in respect to operating expenses at some future date, *St. Louis &c. Ry. Co.* v. *Cleveland &c. Ry. Co.* (1887), 125 U.S. 656, 675. Where there are several mortgages on the railroad, and the creditors secured by one

The effect of these rules is, in brief, that a court of equity, when it acquires control of a railway company's business, *under circumstances which leave it free to deal with the rights of creditors according to its own peculiar conceptions of what is just*, will act upon the theory, that one who lends money for the construction of the road[1] cannot, even by the reservation of an express lien, secure a priority which will prevail, absolutely and under all circumstances, against the claims of unsecured creditors who may afterwards contribute directly to the maintenance of the road as a going concern. To enable the English reader to understand the reasoning by which this somewhat startling theory is supported, it will be advisable in the first place to give a few extracts from the judgments of the Supreme Court of the United States, which, owing to the fact that, for jurisdictional reasons, by far the largest part of suits for the foreclosure of railway mortgages have come into the Federal Courts, is virtually the ultimate arbiter of questions arising out of the management of this kind of property by receivers.

In *Fosdick* v. *Schall*[2], after an exhaustive argument by some of the ablest counsel in the United States, an elaborate and carefully worded opinion was prepared by Chief Justice Waite. The kernel of the judgment is the following passage: 'Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights of the parties sometimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labour,

of these have alone profited by a diversion of the income to payments of bonded interest, or for permanent improvements, the unsecured creditors have no equity against the other secured creditors.

[1] So far as the writer knows, the effect of the doctrine of preferential debts upon the rights of holders of *income bonds* has never been directly determined. If the lien was not restricted expressly to the surplus income left after operating expenses were paid, it would be an interesting question whether such a restriction would not be implied, as it has been in the case of the bonds secured by a general lien on *all* the property, *including* the income.

[2] 99 U.S. 235, 251 (1878).

supplies, equipment, and improvements, are permitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt fund shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. The mortgagee has strict rights which he may enforce in the ordinary way. If he asks no favours, he need grant none. But if he calls on a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favouring one, injustice shall not be done to another.'

Four years later a new phase of the question presented itself. In *Miltenberger* v. *Logansport Ry. Co.*[1], the judge who appointed the receiver, believing that there was imminent risk of an entire stoppage of the traffic if the claims of certain creditors were not paid, took upon himself to avert this calamity by authorizing the receiver to borrow money on the security of the *corpus* of the property, and declaring the loan to be a charge prior to the mortgage. On appeal, the action was upheld, upon grounds thus stated in the opinion delivered by Mr. Justice Blatchford: 'Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain

[1] 106 U. S. 311 (1882).

classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of such business relations would be a probable result—the general consequence involving largely, also, the interests and accommodation of traffic—may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court in *Barton* v. *Barbour*[1].'

In the ensuing year the doctrine of *Fosdick* v. *Schall* received a final development, and it was in effect declared that the court which appoints a receiver should stand in the shoes of the mortgagor company itself for *all* purposes, and, so far as the payment of outstanding obligations for operating expenses was concerned, should deal with them precisely as the debtor itself would, or, at least, ought to have done, if it had remained in control of the property. 'The business of a railroad,' said Chief Justice Waite in delivering the opinion in *Burnham* v. *Bowen*[2], 'should be treated by a court of equity as a going concern, not to be embarrassed by any unnecessary interference with the relations of those who are engaged in, or are affected by it. Hence when a court of chancery, in enforcing the rights of mortgage-creditors, takes possession of a mortgaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it received from earnings all the debts which, in equity and good conscience, may properly be termed the

[1] 104 U.S. 126.

[2] 111 U.S. 776 (1883), at p. 780.

debts of the income, before it is applied in any way to the use of the mortgagees.'

These three passages exhibit the doctrine of 'preferential debts,' as they are now commonly termed, as the outcome of two entirely distinct ideas [1]. One is that, in equity, the bondholders have no *right* to any part of the income, except the surplus which may remain after those debts have been paid. The other is that a court of equity, which undertakes to manage a railway, will act on the hypothesis that it has the *power* so to dispose of the various assets under its control, as to ensure that the road shall be kept in active operation for the benefit of the public, and that the strict legal rights of the bondholders, whether as regards the income or the *corpus*, must, if the necessity should arise, give way to this paramount consideration.

That the use which has been made of these ideas is 'a new departure,' as it was bluntly styled by a State Court which followed *Fosdick* v. *Schall* with a good deal of reluctance [2], must, we think, be conceded. It is sufficiently obvious that, in treating the application of the income of the receivership to pre-existing debts as a mere adjustment of accounts, or referring such application to the preservative powers which a chancellor possesses in regard to a sequestrated estate, the courts are simply rendering to the principle of continuity that formal homage which, according to the traditions of Anglo-American jurisprudence, should be the decorous concomitant of any specially heroic feat of judicial legislation. The phraseology and the doctrines to which it applies are familiar; but the meaning here ascribed to them is entirely without precedent. Nor, it is conceived, can any other view be taken of the curious machinery of the imposition of conditions by which the equity of preferred debts is commonly worked out. The theory that, as a request for a receiver is an appeal to the discretionary powers of a chancellor, he may, for this reason, refuse to do equity by appointing such an officer, unless the petitioner will also do equity by allowing the income to be applied to the payment of outstanding debts, seems to have no more solid foundation than certain ambiguities of terminology. It compels us, in the first place, to attach to the word 'discretion' a meaning entirely different from that which it commonly bears, when used in relation

[1] So far as appears from the report, the case of *Miltenberger* v. *Logansport Ry. Co.*, supr., was decided without any reference whatever to *Fosdick* v. *Schall*, though it may of course have been noticed by counsel in arguments of which no mention is made. Unless the absence of a connecting link between the two cases is to be explained in this fashion, it would seem to indicate that the second one must have been intended to illustrate an entirely independent theory, or rather perhaps, as we will attempt to show below, an essentially different application of a fundamental theory which underlies them both.

[2] *Williamson* v. *Washington City &c. Ry. Co.*, 33 Grattan (Virginia), 624.

to the appointment of a receiver. The power of the court in such a case is 'discretionary' merely in the sense that it may exercise its judgment in determining whether the danger to the fund which it is sought to sequestrate is so extreme as to justify such a strong measure as taking it out of the control of the owner[1]. It would, we imagine, be impossible to find any precedent, outside the line of cases we are considering, which sustains the view that the enforcement of a fundamental principle of equity is an exercise of the discretionary powers of a chancellor. In the second place, the peculiar construction placed upon the maxim which is assumed to guide the action of the court seems to be equally destitute of authority. As it has commonly been applied, it merely precludes the plaintiff from obtaining equity, unless he consents to do equity to the *defendant* in respect to the subject-matter of the suit. Until it was used as an instrument to coerce bondholders into the surrender of their legal rights, no one ever supposed that it would justify a court in declaring that the relief asked for would be refused, unless equity was done to some *third person* having interests adverse to those of the plaintiff[2]. Not the least singular aspect of the matter is that the courts still cling to a form of procedure so open to exception, when their own rulings show that it is no longer necessary for securing the equities of the favoured creditors. Under the decision in *Burnham* v. *Bowen*, supr., it is plain that, for all practical purposes, a petition for a receiver is a waiver by the bondholders of their technical rights, in consideration of their obtaining the advantages of a judicial control of the estate on which they have a lien. The idea that there is any importance in subjecting them to conditions at the commencement of the receivership is totally inconsistent with the rule that an order to pay pre-existing debts may be made at any time during the receivership.

Another conception of the *rationale* of the doctrine as to preferential debts, which is not referred to in the passages quoted above, but which has emerged in several cases, must also be ascribed to the same anxiety to seem to be standing on the ancient paths, even when the deviation is most complete. It has been argued that bondholders who do not exercise their right of entry under the trust-deed within a reasonable period after a breach of its conditions are equitably estopped to deny that the mortgagor company, during the time it was allowed to remain in possession, was their agent for the purpose of procuring the needful labour and supplies for the

[1] Kerr on Receivers, p. 3; Beach on Receivers, § 5; High on Receivers, § 7.

[2] This objection was pointed out by Judge Cofer of the Kentucky Court of Appeals in an able dissenting opinion which he delivered in *Douglas* v. *Cline* (1877), 12 Bush 699. His arguments remain unanswered, and, as we venture to think, unanswerable.

maintenance of the road [1]. It would, however, seem to be impossible to effect, along this line, any real *rapprochement* between equity jurisprudence, as ordinarily administered, and the peculiar doctrine now under discussion. At the most, an estoppel could only arise in the limited class of cases in which the conduct of the lienors has been positively calculated to mislead the unsecured creditors in some way. But the fatal objection to the theory is that, although delay in enforcing legal rights may sometimes prevent the successful pursuit of those rights in a court of equity, this rule has never been so construed as to furnish any warrant for the position, that the rights of one creditor may be modified as a direct result of the remissness of another creditor in pressing his claims against the common debtor. That such a case falls within the scope of the principle of estoppel is a conception fully as novel, and as much in need of support, as the doctrine in aid of which it has been vouched.

Assuming, therefore, that we really have to deal with a doctrine which has hitherto been alien to equity jurisprudence, we may proceed to inquire, whether it can make good its title to juridical naturalization by some better credentials than the external drapings of familiar terminology with which the courts have undertaken to disguise its foreign origin.

From the passages quoted above it is evident that both the *unconscientiousness* of either paying or receiving the bonded interest before the operating expenses are provided for, and the *preservative powers* of the court to keep the road in operation, even if that should involve the sacrifice of the strict legal rights of the bondholders under the mortgage contract, are intended to rest upon the theory that the business carried on by a railway company is, in certain essential features, unlike other kinds of business. The differentiating factors may apparently be reduced to two.

[1] This theory seems to have first made its appearance in an unreported case, *Clack* v. *Williamsport Ry. Co.* (1873), decided by Mr. Justice Strong of the Supreme Court of the United States, while he was on the bench of the State of Pennsylvania. It has been countenanced to a greater or less extent in the following cases:—*Duncan* v. *Trustees* (1876), 3 Central Law Journal 579; 9 Am. Ry. Rep. 386; *Douglas* v. *Cline* (1877), 12 Bush (Kentucky) 699; 18 Am. Ry. Rep. 273; *Williamson* v. *Washington City Ry. Co.*, 33 Grattan (Virginia) 624; *Dow* v. *Memphis &c. Ry. Co.*, 20 Fed. Rep. 267; *Hiles* v. *Case* (1880), 9 Bissell 549; *Skiddy* v. *Atlantic &c. R. R. Co.* (1879), 3 Hughes 320. The Supreme Court of the United States has never formally approved it in its undiluted form, but has gone so far as to mention delay in entering as a circumstance which, in an aggravated case, would strengthen the equities of preferred creditors, *Union T. Co.* v. *Southern* (1883), 107 U.S. 591; *Morgans &c. Co.* v. *Texas Centr. Ry. Co.*, 137 U.S. 197. See also to the same effect, *Blair* v. *St. Louis &c. Ry. Co.*, 22 Fed. Rep. 471. The conception of such an agency has been recently combated by one of the Federal Circuit Judges in *Farmers' L. & T. Co.* v. *Vicksburg &c. Ry. Co.*, 33 Fed. Rep. 778, and its weakness very effectively exposed. It has also been emphatically disapproved in *Farmers' L. & T. Co.* v. *Chicago &c. Ry. Co.* (Fed. Rep., 1889), 8 Ry. & Corp. L. J.

The first is that a railway is, to a very large extent, operated upon credit, regularly allowed to run considerable periods, and that this credit is given not so much in reliance on the general assets of the company as upon the current income. The second is that a railway company is a quasi-public corporation, in the performance of whose functions the community, as a whole, is directly interested. That these considerations are, as grounds for modifying legal rights, of very different importance will hardly be disputed. As to the first, it is enough to point out that the system of giving and receiving credit is a characteristic of many other concerns besides railways, and that the owners of such concerns are, like railway companies, apt to lie in arrear with current expenses, when a long-threatened insolvency overtakes them. It is not easy to see, therefore, upon what satisfactory ground it can be held that a railway occupies a position so unique in this respect that what, in the case of other establishments, is regarded as merely a commendable observance of a sound principle of business ethics, viz. that current expenses ought to be paid out of current income, should be raised in this one instance to the dignity of an equitable rule, paramount even to legal rights expressly contracted for. That the public interest in the continued operation of a railway is a much weightier reason for administering it on peculiar principles may be more readily conceded. The English reader should remember that this is a consideration which appeals with special force to American judges who have, in other connexions, been accustomed to accentuate the difference between semi-public and purely private corporations[1]. It seems, in fact, to be an unavoidable conclusion that, if we are compelled to take one or other of these characteristics of a railroad company as a foundation for the doctrine of preferential debts, the latter is alone adequate to bear the weight to be placed upon it. For this view we have the high authority of one of the most distinguished members of the Supreme Court of the United States, who has of late been much talked of on both sides of the Atlantic in his capacity of President of the Venezuela Boundary Commission[2]. But a more correct apprehension of the doctrine will, it is conceived,

[1] An illustration of this attitude which has some bearing on the present discussion is the emphatic declaration of one of the Federal Circuit judges that, even if the interests of stockholders, bondholders, or general creditors are sacrificed, 'every dollar of the earnings of a road must be applied to keep up its maximum efficiency, as required by the political power which created it,' *Talcott* v. *Township of Pine Grove* (1872), 1 Flippin 145.

[2] 'Underlying the rule which the Supreme Court of the United States has laid down with respect to the payment of prior unsecured debts recently accrued runs the thought that a railroad corporation owes a duty to the public which has given it its franchise and enabled it to construct its road—the duty of operating that road for the benefit of the public,' *Central T. Co.* v. *Wabash Ry. Co.*, 23 Fed. Rep. 863, per Brewer J.

be obtained by taking into account both of the differentiating factors upon which stress has been laid. In other words, the extent to which credit enters into the business of a railway company *explains* why the public interest in that business is permitted in this instance to modify strict legal rights. If each of the factors is given its proper weight, the *rationale* of the doctrine may be stated in something like these terms: The duty of the bondholders to yield in certain cases to the unsecured creditors depends upon the principle that the non-payment of outstanding debts for operating expenses would create, under the peculiar circumstances, a more than usually imminent risk of a cessation of traffic, and that the detriment which the public would suffer from the actual occurrence of such a calamity renders it unconscientious for them to ask the court to take any dangerous chances by leaving such debts unpaid. We have not found any judicial statement of principles which takes this precise form, but some such conception seems to be necessary to explain the conclusion at which the Supreme Court of the United States has arrived in regard to the question whether a railway is the *only* concern to which the doctrine of preferential debts is applicable. It was held in *Wood* v. *Guarantee Trust Co.*[1] that the unsecured creditors of a water company were not entitled to any special priority, and it was remarked significantly, though with a rather tantalizing lack of plain-spokenness, that such priority had never been accorded except in the case of a railway company. As a water company bears the most distinctive and characteristic of all the *indicia* of a quasi-public corporation—the right to acquire property by proceedings in eminent domain[2]—and that part of the community which it serves is at least as strongly interested in the continued and successful performance of its functions as are the persons who use a railway, the only construction apparently which can be placed upon this decision is, that the applicability of the doctrine of preferential debts was denied in this instance because the *clientele* of such a company is practically a constant quantity, which would be very slightly, if at all, affected by any action which a disappointed creditor might, in the exercise of his legal rights, be able to take. A concern of this sort may reasonably be placed in a different class from one which is dependent for its prosperity on the ability of those conducting it to meet promptly and without interruption the requirements of a continually

[1] 128 U. S. 416 (1888).

[2] It seems that the existence or non-existence of the power to acquire property by proceedings in eminent domain is, so far as it goes, a crucial test of the character of a corporation as a public or private body. On this ground it has been held that the doctrine of preferential debts has no application to a company which is a common carrier *by water*, *Bound* v. *South Carolina Ry. Co.*, 50 Fed. Rep. 312.

fluctuating body of customers, the loss of whose patronage even for a brief period may cause irreparable damage. This view receives a negative support from a ruling of the New York Court of Appeals, denying that the general creditors of a hotel company are within the purview of the doctrine [1]. In this case there was the same probability of irremediable injury to the business, if it were temporarily thrown out of gear, as there would have been in the case of a railway. But, as the company was in no sense a quasi-public corporation, one of the essential prerequisites to the application of the doctrine was wholly lacking [2].

The most salient defect of the doctrine which the courts have thus raised upon this foundation of the public interest is that it either goes too far or not far enough. Every reason which, from this point of view, may avail in favour of the creditors who have helped to keep a railway in operation should logically avail in favour of the creditors who have helped to construct it. Yet the authorities are unanimous in laying down the rule that creditors who have furnished labour and supplies while a railway is building have no special claim upon a court of equity [3]. The public, it seems, have no direct interest in the welfare of the railway organism until it becomes a living creature—a theory for which it would be hard to find any rational basis. It sounds, in fact, perilously like a grotesque legal perversion of a famous remark of Napoleon's—as who should say, the woman who has borne many children deserves well of her country, but the woman who has nursed many children deserves still better.

The want of homogeneity in the doctrine produced by this cardinal inconsistency has been still further aggravated by the fact that, even within the arbitrary limits to which the doctrine has been thus confined, the courts have shrunk from carrying to its logical conclusions their theory of the public interest. On general principles, it is apparent that claims for damages for a tort or a breach of contract should be placed outside the favoured class, for they certainly do not represent anything given or done for the purpose of keeping up the road as a going concern. The weight of

[1] *Raht* v. *Attrel* (1877), 106 N. Y. 423.

[2] In a case decided before *Wood* v. *Guarantee T. Co.*, supr., it was held that the unsecured creditors of a gas company were entitled to the same priority as those of a railway company, *Reyburn* v. *Consumers Gas Co.* (1887), 29 Fed. Rep. 561. But since the ruling of the Supreme Court of the United States as to a water company, this ruling cannot be regarded as good law. It has been expressly repudiated in Tennessee, *Hunt* v. *Memphis Gaslight Co.* (1895), 31 South-Western Rep. 1006. There is of course still less justification for placing manufacturing and mining companies on the same footing as a railway company, *Laughlin* v. *United States Rolling Stock Co.* (1894), 64 Fed. Rep. 25; *Hooper* v. *Central T. Co.* (Maryland, 1895), 32 Atlantic Rep. 505; *Merchants Bank* v. *Moore* (Alabama), 17 Southern Rep. 705; *Seventh Nat. Bank* v. *Shenandoah &c. Co.* (1887), 35 Fed. Rep. 436; *Snivley* v. *Loomis Coal Co.* (1895), 69 Fed. Rep. 204.

[3] *Pittsburg Steel Co.* v. *Porter*, 120 U. S. 649; *Wood* v. *Guarantee T. Co.*, 128 U. S. 416; *Fogg* v. *Blair*, 133 U. S. 534; *Toledo &c. Ry. Co.* v. *Hamilton*, 134 U. S. 296.

direct authority is in favour of the view, and it is also in consonance with the spirit, if not the letter, of a recent ruling by the Supreme Court of the United States [1]. On the other hand, it would also seem, on general principles, that *all* creditors whose services or supplies have enabled the company to discharge its duties to the community should be entitled to priority. This undoubtedly is the construction which would naturally be placed on the passage quoted above from *Fosdick* v. *Schall*. But the scope of that decision has been greatly narrowed by a recent ruling of the same court, the effect of which is that the question whether a creditor can avail himself of the benefits of the theory that the community at large has an interest in the continued operation of the road is to be determined by ascertaining to which part of the corporate assets he intended to look for the payment of his claim. If his reliance was on the personal credit of the company, he will obtain no preference; if on the current income, his demand will be paid out of the current income of the receivership before any part of it is turned over to the bondholders [2].

This limitation of the doctrine was doubtless introduced as the readiest means of escaping the too drastic operation of the rules originally propounded. Giving credit to one of two funds belonging to a single debtor may not improperly be allowed to create rights against that fund similar to those which arise from giving credit to one debtor rather than another. It is obvious, however, that by this modification of their main theory the court has opened the door to some curious difficulties. We have seen that the public

[1] That claims for breach of contract are not preferred, see *Olyphant* v. *St. Louis &c. Co.* (1886), 28 Fed. Rep. 729; *Central T. Co.* v. *Wabash &c. Ry. Co.*, 32 Fed. Rep. 566. To the same effect, in regard to claims arising out of torts, see *Central T. Co.* v. *Wabash &c. Ry. Co.* (1886), 28 Fed. Rep. 871; *Farmers' L. & T. Co.* v. *Green Bay &c. Ry. Co.* (1891), 45 Fed. Rep. 664; *St. Louis &c. Ry. Co.* v. *Riley* (Circuit Court of Appeal), 70 Fed. Rep. 32. The doctrine of the last three cases, on the other hand, is rejected in *Farmers' L. & T. Co.* v. *Vicksburg &c. Ry. Co.*, 33 Fed. Rep. 778; *Dow* v. *Memphis &c. Ry. Co.*, 20 Fed. Rep. 26; *Farmers' L. & T. Co.* v. *Northern Pac. Ry. Co.*, 71 Fed. Rep. 245; but these decisions can scarcely be sustained in view of the rulings of the Supreme Court of the United States, which has never preferred claims of this class, and has expressly declared that no preference can be accorded to any debts but those which it has itself placed on the favoured list. This statement of opinion is necessarily conclusive against the view that claims for torts are a prior charge on the assets, at least so far as the Federal Courts are concerned; see *Kneeland* v. *American L. & T. Co.* (1890), 136 U.S. 89.

[2] Circumstances which have been held by the Supreme Court of the United States to indicate a reliance on the personal credit of the company, and not on 'the possible order of a court which might appoint a receiver,' are (1) the insertion of a provision in an express contract of sale that the subject-matter may be taken back in case the vendee defaults in paying interest on the mortgage bonds; (2) the relations between the officers of a vendor corporation and those of a vendee railway company, from which it may be inferred that the former had full notice of the financial condition of the latter, *Thomas* v. *Western &c. Car. Co.*, 149 U.S. 95. Why a creditor who is better acquainted than the others with the true position of the common debtor should be held to have relied on that part of the assets which are the most difficult to get at, is not very apparent, and has not been explained.

interest in the operation of a railway will, in extreme cases, justify a judge in declaring a loan of money required for the payment of certain pressing debts to be a paramount charge on the *corpus* of the estate. A case might easily arise in which there would be the clearest possible proof that the holder of a claim in regard to which this power might be exercised had trusted to the general personal responsibility of the company. Under such circumstances the question presents itself, which rule is to give way, if the creditor is in such a commanding position that by enforcing his rights he can suspend the operation of the road? For example, the case last cited is to the effect that one who sells rolling-stock for a price payable in instalments and reserves the right of resuming possession of the property in a certain contingency is not entitled to any preference. We have only to suppose, then, that such a creditor owns the whole or most of the rolling-stock in use on the road—surely not an extravagant supposition—and that the contingency specified in the contract has occurred before the appointment of the receiver. Clearly, if the creditor chose to enforce his contract rights, there would be no alternative but to make it a prior lien on the *corpus*, for under the doctrine of *Miltenberger* v. *Logansport Railway Co.*, supr., the trains must, at all costs, be kept moving. It would be a stretch of refinement to say that a receiver may escape from this dilemma by procuring the necessary supplies from other sources. For practical purposes it is a wholly unwarrantable assumption that any large quantity of rolling-stock may be procured at short notice. It follows, therefore, that a creditor who, according to one theory of his rights, would obtain no preference even as to the income, might according to another theory be able, under circumstances readily conceivable, to secure a priority as to the *corpus* itself—a singular clashing of principles which goes to prove that public interest, like public policy, 'is a very unruly horse'[1]. The spectacle of a chancellor paying the debts of an insolvent estate for reasons resembling those which induce an individual debtor to pay the most importunate dues first, is not exactly edifying, and may even set one thinking about Mr. Gladstone's philosophically correct, but singularly ill-timed, remark that the Holloway Gaol outrage 'drew attention' to the grievances of Ireland. This is not a wholly fanciful parallel, for the New York Court of Appeals has, in sober earnest, been obliged to overrule the action of a subordinate judge in charging as a first lien upon the *corpus* of the estate of a hotel company the claims of labourers who had threatened to destroy the property if the receiver refused their

[1] Burrough J. in *Richardson* v. *Mellish* (1824), 2 Bing. 229, 252, 27 R. R. 603, 622.

demands [1]. The court, while relying mainly on the fact that such a company is not a public corporation, significantly remarked that it should not have been assumed that the civil authorities were incapable of protecting the property from outrage. Under this particular set of circumstances a court which was administering a railway would perhaps deem itself justified in refusing to give way to pressure. At all events the supposition that the duty of the State to safeguard the property of citizens from destruction by a lawless mob seems to be peculiarly pertinent in a case in which the State itself is directly interested. But even if the doctrine as to the preservative functions of a court were held to be superseded in this instance by more imperative reasons of public policy, the main objection indicated above still holds good. There is no way of evading the dilemma that, by perfectly legitimate pressure, a creditor may force the court to choose between the abandonment of its functions as a dispenser of equity, as between the parties to the suit, and its functions as a custodian of the interests of the community at large.

It is difficult to resist the conclusion that even the most indulgent theory which it is possible to accept as to judicial legislation is not an adequate justification for promulgating a doctrine of such extremely narrow scope that it has no application to any insolvent estates except those of one particular kind of common carriers, and to these only when a special form of relief is asked for. The fact that the courts, in feeling their way to a collection of definite rules which should embody the general principles involved in the doctrine, and at the same time not infringe contract rights to an unwarrantable extent, have found it necessary to introduce restrictions and qualifications which lead to such anomalous results as those indicated in the foregoing remarks, certainly does not make it all easier to admit that they have acted within their legitimate powers. To put the matter in another form, it is submitted that in spite of the complacent assertion to the contrary made by the Supreme Court of the United States in *Fosdick* v. *Schall*, supr., the preference of unsecured debts for the reasons assigned is not an application of old principles to new circumstances, but an application of principles which have never been recognized at all as a ground of equitable relief. Granting that what the bondholders have been compelled to do, in paying all debts ordinarily payable out of income, is only what every prudent and fair-minded man would have done voluntarily, it can scarcely be disputed that, ill-defined as is the boundary between the domains of ethics and jurisprudence, the rule of conduct thus enforced belongs to the

[1] *Rahl* v. *Attril* (1877), 106 N. Y. 423.

category of those which do not warrant judicial action until they have been impressed with a statutory stamp. Nor is it by any means self-evident that, because a railway company discharges certain public functions, the courts should have undertaken, *proprio motu*, to adjust the rights of its creditors in such a manner as to minimize the risk of a stoppage of the traffic. Indeed, so far as analogy and usage may avail as arguments, there would seem to be solid reasons in favour of the presumption, that it is precisely under such circumstances as these that the proper law-making body should alone undertake to declare the will of the community whose interests are to be protected.

But when every objection on technical grounds has been made, it still remains indisputable, that 'the ends of justice have, on the whole, been promoted by the doctrine of preferential debts[1].' This is no slight praise. A judicial paternalism which enforces a sound business morality, and in the long run is beneficial to the only parties whose contract rights it invades, can scarcely be stigmatized as a very dangerous usurpation of legislative functions.

C. B. LABATT.

[1] *Farmers' L. & T. Co.* v. *Kansas City &c. Ry. Co.* (1893), 53 Fed. Rep. 182. This way of looking at the doctrine would place it on pretty much the same ultra-legal grounds as that 'humane practice' of paying the arrears of the wages of clerks and servants which prevailed in bankruptcy proceedings before it was sanctioned by statute, *Thomas* v. *Williams* (1834), 1 Ad. & E. at p. 690, per Lord Denman.

One of the most crying evils incident to mortgage foreclosures prior to the adoption of the doctrine of preferential debts was the facility with which they could be manipulated for the purpose of repudiating the unsecured debts of the companies, while the mortgagees preserved their lien unimpaired. The stockholders would arrange with some friendly bondholder to institute a foreclosure suit, and the property would be bought in by a committee representing both the stockholders and bondholders, as individuals. The latter would then organize a new company, distributing the various interests according to the priorities existing before the sale, and proceed to operate the road. Under this arrangement it is easy to see that the unsecured creditors would be usually left without any means of obtaining satisfaction, the proceeds of the sale being in most instances a merely nominal sum for want of any really competitive bidding, and therefore very unlikely to yield any surplus over and above the amount of the lien debts. The proceedings, in short, were for all practical purposes a bankruptcy fraudulent as to one class of creditors, yet so carried through as to give no opportunity for attacking them on the ground of fraud.

STATUTORY RULES AND ORDERS.

THE difficulties in the way of simplifying and consolidating the Statutes do not affect the like treatment of the Rules and Orders. The Statutes can be dealt with only in the parliamentary arena, and legal bills are at the mercy of every party storm and even of the enterprising private member; they may be blocked, they may be talked out, or they may survive only to fall in the annual massacre of innocents which heralds the close of the session. But the Rules and Orders are remote from such catastrophes; they belong to department-land, where the politicians cease from troubling and the permanent officials are—sometimes—at rest.

Under such favourable conditions it is not a little strange that for years past the Orders (as for shortness this whole class may be called) were heaped upon one another in unregulated confusion, that there was no convenient publication of them and that some were accessible only in the pages of expensive text-books, that there was little or no attempt at consolidation, and that the first satisfactory index was not issued until 1891. That this has been since enlarged, that the public general Orders are now issued like the Statutes, and that those previous to 1890 have been re-issued in a revised edition are matters of recent history, for which the thanks both of the profession and the public are due to the Statute Law Committee, and particularly to Mr. Pulling and his coadjutors. The more their work is examined the better will the magnitude of it and the success with which it has been conducted be appreciated.

That the difficulties of this work as well as of reference generally are unduly increased by the state in which many of the Orders are issued by the departments is hardly open to doubt, and several reforms in this respect may be here suggested.

Every Order, at least every public and general one, should have a short title. In some cases this is now given, but the practice should be extended to all the Orders which are reprinted in the official volumes.

In every Order there should be set out, either in the heading or the preamble, not only the Act or Acts, but the particular section or sections under which it is made. This also is necessary for satisfactory reference; it is commonly done, but it is often omitted, and the mere general reference is particularly unsatisfactory when (as in Orders 415 and 549 of 1896) the Act referred to has more than 700 sections, or when (as in 449 and 566 of the same year) several Acts are mentioned, in some cases by their collective title alone.

It may be added that in any republication of existing Orders the Statute Law Committee should be empowered both to remedy such defects in them and to number those of each year consecutively like the current issues.

In almost every department a thorough revision of the Orders is necessary, eliminating what is obsolete and consolidating what should be retained. Not the least valuable feature of the present collation of the Orders is the facility which it gives for simplification and consolidation, and it has been already mentioned that the principal difficulties which hinder the consolidation of the Statutes do not affect that of the Orders. Together with this, all existing Orders made under sections which have been repealed and re-enacted in a later Act should be repealed and re-issued under the present empowering section or sections.

The last proposal suggests a reform within the province of the Legislature. The Orders should be kept homogeneous with the Statutes under which they are made, and whenever these Statutes are repealed and re-enacted in a consolidating Act, the Orders made under them should be included in the repeal, and the coming into operation of the new Act should be delayed sufficiently for the rule-making authorities to revise and reissue the Orders under the new sections in the interim, so that when the old Acts and Orders expire the new may come into force together. This course has already been provided for by section 37 of the Interpretation Act, 1889, and further facilities for provisional rules have been given by the Rules Publication Act, 1893; but these have been generally neglected, and the legislative practice has been to specifically save the Orders from the general repeal, thus increasing the difficulties both of reference and of construction, and making, so far as the Orders are concerned, the previous confusion worse confounded. Perhaps the worst instance of this defect in consolidation is the Merchant Shipping Act, 1894, which, though it did not come into operation for nearly six months after it was passed, exempted from repeal all the Orders made under the repealed Acts—Orders which number several score and which, even apart from the consequent complication of reference, stand in urgent need of revision.

With the suggested work thoroughly carried out, the chief reason for arranging and printing the Orders in groups would disappear, and they might, like the Statutes, be printed simply in chronological order, a course which would save time and trouble, would make subsequent volumes continuous with the preceding ones, would obviate the necessity of rearrangement in revised editions, and would greatly facilitate the whole work of indexing, for the Orders might then, like the Statutes, be indexed on the basis of year and number alone.

Under such conditions the best form of index would probably be one based on the empowering Statutes in chronological order, supplemented by a table of subject-references, the Chronological, Departmental, and Repeal Tables, together with the classified Appendices, remaining substantially as at present. To show the form which the Index Table and the Reference Table might take, a scheme setting out certain Orders of 1896 is appended to this paper. When an Order is issued under several Acts or sections the general rule would, of course, be to enter it under the principal one and to cross-reference it under the others.

Not only would an index thus compiled lend itself easily to future editions, but in several ways the work of the indexer would be simplified, and the index, being independent of volume and page references, might be a continuous compilation throughout each year. At present there is no satisfactory index to the intricate mass of this indirect legislation for each year till some time after the year has expired, but with the index compiled as suggested it might keep pace with the issue of the Orders, and might be published quarterly or even monthly, each part incorporating and superseding the previous one, and the final one being reproduced as the index to the annual volume. And it may be suggested that these indexes might refer to the Statutes of the year also, the final parts as regards the Statutes practically corresponding with the index to the annual volume of these.

The Prerogative Orders form what is practically a separate series, and the index to them is naturally of a classified character, supplemented by an alphabetical reference table. These Orders also might be numbered consecutively as regards each year so as to facilitate short reference, and in any republication it would probably be well to have them all arranged in chronological order in a separate volume.

Such revision as is here suggested would prepare the way for a new edition of the Orders. It may seem rather early to speak of such a thing before the revised edition of those previous to 1890 has been out a year, but already the subsequent ones exceed these eight volumes in bulk, and it needs but a glance through the whole to learn both the necessity for such a work and the comparative ease with which it could now be done. It seems probable that the second revised edition of the Statutes will be brought down to date by the beginning of the next century; the simplification of the Orders might well be carried through before that, and a new edition of these issued about the same time.

J. Dundas White.

INDEX TABLE.

REFERENCE TABLE.

THE INDIAN PRESS PROSECUTIONS.

'IT is usual to describe the establishment of practically unlimited freedom of political discussion as a triumph of common sense, and a conclusive proof of the idleness and absurdity of the restraints which have been removed. This view may no doubt be correct. It may also be true that the change marks a period in human affairs which is no more final than any of its predecessors, and that if in the course of time governments should come to be composed of . . . a small body of persons who by reason of superior intellect or force of character or other circumstances have been able to take command of the majority of inferiors they will not be likely to tolerate attacks on their superiority, and this may be a better state of things than the state of moral and intellectual anarchy in which we live at present. Which of these views is true it would be out of place to discuss here. It is enough to say that in this country and in this generation the time for prosecuting political libels has passed, and does not seem likely to return within any definable period.'

This rather long quotation from a well-known work [1] of an author familiar with the Indian Penal Code seems an appropriate heading for a paper concerned with the treatment of political libels in a country where rule rests in the hands of a small body of persons possessed of that superior intellect and force of character to which the writer refers, but who nevertheless govern in accordance with laws based to a considerable extent upon the principles of our own. The application of these to men of diverse creed and race—to the alien millions over whom we rule in India—is a wonderful process, one of wonderful wickedness if we may believe some native writers, and problems of almost equal interest and difficulty arise whether we apply Western doctrines to Oriental institutions or to institutions that are not indigenous to the soil.

Freedom of the press may be classed under the latter category. It is a plant of exotic growth in India, though rapidly becoming acclimatized.

The liberty enjoyed by English writers has been the outcome of judicial decisions and of legislative enactments extending over a long period, and to refer to these in detail would involve the re-writing of a familiar chapter in our constitutional history and one largely concerned with the law of seditious libel. We sometimes

[1] Stephen, Hist. Crim. Law, ii. 376.

speak of sedition, but this is a liturgical rather than a legal term; special petitions are ordained for deliverance from an evil which is associated in the Prayer Book with 'heresy and schism,' but according to one eminent authority there is no such offence as sedition known *eo nomine* to the English law. We take cognizance of language used with what is called a seditious intention and of conspiracies to promote a seditious purpose, but when we pass from these offences to acts of violence the offenders are now generally said to be guilty of either riot or treason. The lines of demarcation, however, between seditious libels and treason were in times past far less clear than they are to-day. The Tudor sovereigns, as we know, had a fondness for statutes creating new treasons which were, no doubt, passed, especially on the accession of a new sovereign, with a view to secure the safety of the throne. Prayer itself was brought within the definition by an Act passed in the first year of Mary's reign, in which it was declared that any person should be held guilty of treason who in express terms prayed that the Queen's life might be shortened. The common law was, however, very comprehensive, and at a later period the interpretation of prophecy once brought a writer within its grasp. A Mr. Williams, of the Temple, was executed in 1619 for writing two books called Balaam's Ass and Speculum Regale in which he took upon himself the office of a prophet.

'He affirmed,' it was said, 'that the King which then was would die in the year 1621, which opinion was founded on the prophecy of Daniel where that prophet speaks of a time and times and half a time. And he also said this land was the abomination of desolation mentioned in Daniel, and that it was full fraught with desolation and that it was the habitation of devils and the antimark of Christ's church. All the Court clearly agreed that he was guilty of high treason at common law, for these words imported the end and destruction of the King and his realm. And this although he enclosed his book in a box sealed up and so secretly conveyed it to the King and never published it.'

I think we shall all agree with the comment of Sir James Stephen who, after quoting the above extract from the State Trials, adds, 'Poor Williams.'

Preventive measures followed. The ordinance of the Long Parliament in 1644 initiated legislation under which for fifty years the printing of unlicensed books became a criminal offence, and it was not until the eighteenth century that our political institutions became subject, practically, to freedom of discussion. For a long time this freedom was tolerated rather than legalized, seditious libel, according to Sir James Stephen, being correctly defined prior

to 1792 as 'written censure upon public men for their conduct as such or upon the laws or upon the institutions of the country.' The practical enforcement of such a doctrine was, as he remarks, clearly inconsistent with any serious discussion of political affairs. Discussion was, in fact, remarkably free, but owing to the unsatisfactory condition of the law prosecutions were from time to time instituted and the ingenuity and resource of the British juryman, even when stimulated by rhetoric such as Erskine's, did not always prevent a strict application of the law. The Libel Act of 1792 materially qualified the definition of seditious libel and allowed a jury more latitude in arriving at a verdict; but in the stormy years that immediately followed the passing of the Act prosecutions were by no means infrequent—one of the most celebrated being that of Tom Paine for publishing the Rights of Man. He was convicted on the ground that his work was written with intent to vilify the Revolution of 1688, to bring the King, Lords, and Commons into hatred and contempt, and to represent that they tyrannized over the people. The jury, when his defence was concluded, convicted him with great promptitude, saying that they did not want reply or summing-up.

Since the Reform Bill of 1832 such prosecutions have practically ceased in England; nothing, it has been said, short of direct incitement to disorder and violence being now treated as a seditious libel, and as far as newspapers are concerned, special immunities are granted by the Newspaper Libel Act of 1881.

The functions of the Indian native press were a few years ago described by an influential Anglo-Indian as 'those of an opposition performed with honesty and moderation, and free from the taint of personal bias or malevolence.' The utility of such an index to public feeling and of such a director of native opinion is apparent, and if the description applied to an existent and not to an ideal condition, Hindoo journalism must have attained a high level of excellence, not always attainable by those who hold that the proper function of an Opposition is to oppose. Some of these native editors, however, appear to regard the opinion of their function which I have just cited as a counsel of perfection, that might fall appropriately from the lips of, say, Sir William Harcourt or Mr. Chamberlain, but one hardly to be adopted as a rule of practice, and they must now be regarded as 'decadents'—at least in the eyes of the authorities.

For some time past certain vernacular writers have expended a good deal of energy in attacks on the British administration, and during the early part of the year they, apparently, came to the conclusion that something like a prescriptive right to continue these

had been established in their favour. Other signs of 'disaffection' were not wanting, and the authorities gradually awoke, but they did not at once institute a prosecution, and when they decided to prosecute they did not confine themselves to judicial process.

By Bombay Regulation XXV passed in 1827 and entitled 'A Regulation for the confinement of State prisoners and for the attachment of the lands of chieftains and others for reasons of State,' provision is made for the summary arrest and detention of any one whose 'personal restraint' is desired in order to secure British territory from 'foreign hostility or internal commotion,' but 'against whom there may not be sufficient ground to institute any judicial proceedings, or when such proceedings may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper.'

To the Governor-General and by deputation to the Governor of a Presidency in Council is committed the powers under this Act, and he is authorized to order the arrest and committal to prison of any individual of the class referred to 'with or without any immediate view to ulterior proceedings of a judicial nature.' The Governor is directed to fix an allowance suitable to the rank and habits of the State prisoner and to prescribe the means whereby this allowance is to be provided, and rules are laid down for official reports as to the health and comfort of the captive and his right to submit 'representations' to the Government. When the Regulation was first passed it contained a proviso that no measure of this kind should 'be in breach of British law,' but in 1858 this proviso was repealed save as regards 'European British subjects.' There are also provisions under which the estates of zamindars and other persons may for similar reasons of State be attached without judicial proceedings and 'managed' by the Government while the owner is detained. It is, however, considerately enacted that if the Governor releases the captive any balance of profit then in the hands of the collector shall be duly handed to the proprietor on his return to society.

There is no ground for regarding this Regulation as an obsolete piece of machinery. It has been amended from time to time, the latest touch being added in 1886, and a few months ago, upon the awakening to which I have referred, the Governor of Bombay suddenly exercised his powers and caused two native gentlemen, the brothers Natu, to be arrested and locked up, and the operation was, we may assume, carried out as expeditiously and effectively as if the offence of Messrs. Natu had been that of *lèse majesté* and the arrest had been made in Germany. These offenders were not journalists, though they had written some complaints to a collector,

and their sudden incarceration and the sequestration of their property greatly disquieted native editors. I think these 'suspects' are still in custody, but no definite charge has yet been formulated against them.

Under another Act passed in 1864 the Governor-General in Council, or any local Government as regards persons within its jurisdiction, may order any foreigner to remove himself from British India and, if so directed, to leave by a particular route. Upon refusal or neglect to conform with any such Order the offender may be apprehended and detained in custody until the Government choose to release him. By the term 'foreigner' is here meant any person other than a natural-born subject of Her Majesty or a native of British India. About two years ago a foreign gentleman, with a difficult name, arrived in the Bombay Presidency and, after conducting the business of an old furniture dealer for some twelve months or so, commenced his literary career by editing a fortnightly paper—the *Muslim Deccan*—devoted to violent attacks upon the Government. This being brought to the notice of the authorities they considered that such deportment justified them in deporting the editor. The Government accordingly 'pounced,' and the culprit was ordered to quit British territory in twenty-four hours, and to return to Hyderabad, his native state. Unfortunately the man had been obliged to leave Hyderabad in order to escape the wrath of the Nizam with whose subjects he had been interfering in the past. Under these circumstances he could not conveniently get away in twenty-four hours—perhaps the Government knew the circumstances—and I understand he was arrested and shut up on being found in British India after the prescribed time for his departure had elapsed.

We appear to have no powers of this kind in England, and their absence is sometimes attributed to *Magna Carta*. It was indeed recently suggested by Dr. Blake Odgers in his paper on codification that in the course of enacting the legion of amending and revising Acts that crowd our Statute roll, *Magna Carta* had been accidentally repealed. Happily there appears to be no ground for this fear, and the provisions of 25 Ed. I, c. 29, confirming the Charter, and prohibiting exile 'save in accordance with the law,' are no doubt still operative. The English Government has, however, under the saving clause and by virtue of a later Act, a power somewhat analogous to that possessed by the Indian Government. The Statute 10 Geo. IV, c. 7, enacts that every Jesuit and every male member of any other religious order, community, or society of the Church of Rome bound by monastic or religious vows, who comes into this realm, commits a misdemeanour and is liable upon

conviction thereof to be banished from the United Kingdom for the term of his natural life. Section 31 provides that a Secretary of State, being a Protestant, may grant a license to such persons to come into and remain in the United Kingdom for a period not exceeding six months, but any Secretary of State may revoke this license before the expiration of the time so allowed, and if the licensee does not depart within twenty days after the time mentioned in the license, or after notice of revocation thereof, he commits a misdemeanour and is liable to be banished for life. By section 35 every such person ordered to be banished who does not depart within thirty days may be removed to such place as the Privy Council may advise, and any one so ordered to be banished who is found at large in the United Kingdom after three months from the date of such order may be sentenced to penal servitude for life. The Act is unrepealed (though not known to have been ever put in force) and it must be satisfactory to every good Protestant to know that if we decide to follow Prince Bismarck's example we have the means ready at our command.

There was a suggestion of Oriental absolutism about the measures thus adopted by the Indian authorities which perhaps impressed a section of the Hindoo and Mohammedan population, but these operations were clearly unsuited for dealing broadly with the spirit of disloyalty, and the Government very wisely decided to fight in the open and to rely on the ordinary law as laid down in the Indian Penal Code. There is only one section of it—section 124 A—that deals with the specific offence of which some journalists were deemed guilty—that of exciting or attempting to excite 'feelings of disaffection' to the British Government.

The fresh start now made at first ended badly. The editor of the *Pratoda*, a paper published at Poona, had been using violent language in abuse of the Government and was brought before the Sessions Judge at Satara and charged under section 124 A. The journal appears to have been a very insignificant one with a very small circulation. The accused was not tried by a jury, but the judge sat with two native assessors, both of whom advised an acquittal. The functions of these assessors are, however, purely advisory, and the judge is reported to have said that he did not find them 'useful.' He held the prisoner to be guilty and sentenced him to the extreme penalty allowed—transportation for life. He might certainly have added a fine, but perhaps the editor was not a moneyed man. This was obviously a wasteful as well as a savage sentence—little margin being left for dealing with more serious offenders. The judge was, apparently, possessed by punitory ideas of draconic simplicity, which are rarely now found on the Bench,

and the sentence has since been reduced, on appeal to the High Court, to one year's imprisonment.

In England a sentence of two years' imprisonment with hard labour and a fine is the maximum penalty allowed for publishing a seditious libel. In India a man may be sentenced to imprisonment with hard labour for three years or to transportation for life with in either case a fine of unlimited amount. If the offender is a European or an American penal servitude is substituted for transportation. The imprisonment may, by section 73 of the Penal Code, include a term of solitary confinement—a punishment which some years ago was formally abolished here. It should, however, be stated that the infliction of the latter penalty is guarded by several nicely balanced limitations, e.g. the total term must not exceed three months and no prisoner is to have more than fourteen days' solitary confinement at one time, and an interval of not less than fourteen days must elapse between each period of such confinement. If the period of imprisonment exceeds three months the prisoner must not have more than seven days' solitary confinement in any one month.

But the Government decided to deal with offenders of higher rank, and the trial of Mr. Tilak, the last stage in which was reached in the Judicial Committee of the Privy Council on Nov. 19 last, was an altogether different affair. He is a graduate in Arts and Laws of the University of Bombay, of which he is also a Fellow, he was a leader amongst the people and had lately been elected for the second time a member of the Bombay Legislative Council. He edited two journals, one named the *Kesari* and the other the *Mahratta*, both published at Poona in the Marathi tongue, and the former had a circulation of about 7,000. As it appears to be customary for Hindoos to gather round the village schoolmaster and listen while he reads the news, Mr. Tilak's paper had in all probability an influence wider than the number of copies printed would suggest. He was tried before the High Court in September for publishing in the *Kesari* of June 15 last two articles, one containing a kind of poem entitled 'Shivaji's Utterances,' and the other a report of certain speeches delivered at a festival then recently held in honour of Shivaji, by which publications it was alleged he had offended against section 124 A. The trial lasted six days and anything more than a summary is obviously inadmissible here, but in order to understand the grounds upon which the charge proceeded a brief reference to the circumstances immediately preceding the prosecution and to the facts proved at the trial is necessary.

According to English historians Shivaji was a Mahratta chief, born

in 1624, a great administrator, and one who rendered notable services to the Mahratta race. In the earlier part of his career he was nominally a subject of Bijapur. On one occasion, owing to his disloyalty, a Bijapur force was sent against him headed by a Mohammedan general named Afzul Khan. Shivaji sent ambassadors to Afzul representing that he was contrite and willing to surrender, and the Mohammedan dispatched an envoy to negotiate terms. This envoy was, however, a Hindoo and a Brahmin, and Shivaji, with the aid no doubt of powerful arguments, induced him to betray his sovereign and to join Shivaji in protecting the Hindoo religion against Mohammedan power. The story is that the Brahmin having thus been corrupted went back to his master and represented that Shivaji was very frightened and ready to submit, provided Afzul Khan personally visited and reassured him. Shivaji having asked for a friendly conference fortified himself for it by placing troops in ambush round the spot appointed for the meeting, put chain armour on under his clothes, and, thus prepared, met Afzul Khan at the appointed place. The general was attended by a very insufficient escort, and Shivaji, while giving him a friendly embrace, stabbed and murdered him. The ambushed troops then fell upon the followers of Afzul Khan and butchered them. Shivaji secured his independence, became a great national hero, and after his death a tomb was erected to his memory at Raighur, above the spot where his ashes were laid. In 1885 a Mr. Douglas drew attention to the fact that this tomb had been allowed to fall into disrepair, and he reproached the Hindoos. The *Kesari* mentioned the matter, and in 1885 Lord Reay, who was then Governor of Bombay, made a grant towards keeping the tomb in better order. In 1895 the *Kesari* returned to the subject. It was said that the tomb had again been allowed to fall into disrepair, and an agitation was started in order to raise funds and to revive the interest of the natives in their great chief. The *Times of India*, however, opposed the movement and said, in effect, that much unnecessary fuss was being made over a tomb which was in quite as good condition as it need be. This appears to have aided the agitation, and subscriptions began to pour in. A big meeting was held at which resolutions for the maintenance of the tomb were enthusiastically passed, and this was followed in 1896 by a proposal that the exploits of Shivaji should be commemorated by a festival. In the meantime, in 1894, a gentleman named Karkaria delivered some lectures on the subject of Afzul's murder, in which he disputed the judgment of English historians and justified the killing on the ground that political assassination was allowable on occasion—certainly under the circumstances in question—and he argued that

if Shivaji had not killed Afzul, Afzul would certainly have killed Shivaji.

So far nothing illegal occurred and the festival was fixed for June last.

In the early months of this year plague and famine were exercising to the utmost the resources of the Government. Free hospitals were started and sanitary directions were given, but the abysmal ignorance and superstition of the natives placed almost insurmountable difficulties in the path of the authorities. The sick herded together and, if I remember rightly, corpses were concealed in dwellings. Eventually British and Native soldiers were employed to enter the houses of natives in Poona and ensure the segregation of infected persons. Professor Ghokali's charges against the British soldiers have, as we know, been absolutely withdrawn, and it has never been proved that they acted in any way improperly, but their interference was greatly resented by the Hindoos. Between February and April last Mr. Tilak supported the Government by his writings, and he also established private hospitals to which admission could be secured by payment. In May, however, shortly before the Shivaji festival, he said in the columns of the *Kesari* that our soldiers committed excesses, that they had defiled the temples, and pocketed whatever they cared to carry away. While the English people were providing and the Government were spending millions in order, as we thought, to relieve the woes of the Hindoos, Mr. Tilak wrote:—

'We are reduced to such a plight now that if the Government becomes oppressive we have not the ability to punish: if we cry out the Government pays no heed: we do not understand what the law is, and our leaders are not prepared to make it convenient to give such physical or pecuniary assistance to the people as lies in their power. . . . If our eyes are not opened now it is our misfortune, &c.'

Later on in the same month an article appeared in his other journal, the *Mahratta*, entitled 'Free Thoughts,' in which, after referring to the gloom which had fallen upon Anglo-Indian society, not, as he explained, because of the famine and the plague which only weighed upon the wretched natives of an enslaved land, but because the exodus of fashionable personages had interfered with the plans of pleasure-loving people, he proceeded to point out that men and women belonging to a great nation of shopkeepers would not be likely to act otherwise.

'It cannot be expected of them,' he says, 'to take care of the interests of those who surround them. "Make thy purse full to overflowing"—thuswise are they advised who leave the shores of the Marwaris in Europe. They are the great worshippers of gold,

and fully conscious of the charms that lie hidden in the trite saying of Iago, "Put but money in thy pocket." No wonder that some of the non-official Anglo-Indians, the prototypes of the Indian money-lenders, should be the first to leave Bombay after the outbreak of the plague, &c.'

In a previous issue of the *Kesari* for April a letter signed 'Dasanudas' (which may mean a 'slave' or may mean 'an earnest humble speaker') appeared, which was called forth by the refusal of the Government to allow the Sarvajanik Sabha to forward to it certain 'representations.' The merits of this dispute I do not venture to determine, but I understand this Sabha, an association of natives, had made various complaints to the Government which were not only disrespectful in form, but were baseless in fact. However this may be, the writer improved the occasion very much in the style that Mr. Labouchere would have adopted. He says the Sabha must have been speaking the truth, otherwise the Government would not have been so pained by its conduct. He proceeds :—

'I am aware that there is a class of people who entertain the opinion that nothing whatever can be obtained by annoying the Government; if any advantage, great or small, is to be obtained, it will be gained only by sauvity and gentle behaviour. But whether you take or do not take things gently, they never fail to do what they want to do. The difference is only this: if you supplicate piteously, they put a lump of sugar into your mouth and then they twist (your) ear; otherwise they only twist (the ear). So if the ear-pulling cannot be avoided in either case, then I do not know by concealing the vexation (which one feels) from the bottom of (his) heart, (and) by cringing and fawning, one should, for nothing, forfeit his claim to be considered at least a human being. . . . Bless the Bombay Government and its advisers. Well have (they) blazoned (their) power! But why should they be backward in exercising zulum (i. e. oppression) in such manner as they like in broad daylight under the name of the law or of a (Government) Resolution? What are you worth that they should not trample you under foot as they like? In the history of the whole world there is not one instance of the acquisition of political rights by piteous whining and weeping! Even if you passed seventeen thousand resolutions, got an imitation Congress held, made speeches feelingly . . . still there is as much difference between your Parliament and the English Parliament as there is between a (mock) wedding of a toy bride and bridegroom of girls and a real wedding, or between a native prince of the last century and a native prince of the civilized nineteenth century! . . . What is to be done?

'DASANUDAS.'

Mr. Tilak was not prosecuted for writing these words (or indeed for anything written by himself), but if this is a fair specimen of

the writing scattered broadcast in the bazaars amongst persons many of whom never read an English book or newspaper, one can see that the work of the English missionary, as well as that of the English Government, is carried on amid difficulties that are not often realized here.

In June last the festival commemorative of Shivaji's coronation was held, and the poem entitled 'Shivaji's Utterances' was then published by Mr. Tilak. A literal rendering in English heroic verse, were that possible, would fail to convey the impression produced by the original. The general drift of it was to contrast the past and the present life of the people, and it set forth 'in one concentrated form all things which of late years had been known to create bad feelings between the British Government and the natives.'

Once they were happy, now miserable; formerly the Brahmins, who on occasion would draw the sword in defence of their country, were protected, now they were imprisoned, and, it was suggested, unjustly; in Shivaji's day a thousand swords would have leapt from their scabbards to defend the honour of women, now women were assaulted in railway carriages and a cowardly race submitted to these wrongs; formerly the native princes were great and honoured leaders, now on frivolous pretexts they were degraded and deprived of their power; and 'the Cow,' Shivaji proceeds, 'the foster mother of babes . . . the mainstay of agriculturists . . . which I worshipped as my mother and protected more than my life, is taken daily to the slaughter-house and there ruthlessly slaughtered. . . . By annihilating the wicked I lightened the great weight on the globe; I delivered the country by establishing Swarajya (literally one's own government—native rule) and by saving religion. Alas! I now see with my own eyes the ruin of my country. These forts on which I expended money like the rain, to acquire which fresh and fiery blood was spilled there, from which I sallied forth roaring like a lion through the ravines, have crumbled down. What a desolation is this! Foreigners are dragging our lakshmi (the goddess of wealth) violently by the hand by means of persecution (by levying taxes); along with her plenty has fled, and after that health also. This wicked Akabya (misfortune personified) stalks with famine through the whole country, relentless death moves about spreading epidemics of disease.'

We need, however, not only to translate the poem but ourselves, and take our place in the midst of an excited people who, amid the troubles of famine and plague, read or listened to words instinct with the memories of real or imaginery past greatness, and well calculated to awaken high aspirations and to revive the hatred of alien rule.

Speeches were also delivered, amongst others, by Professor Bhanu

and Mr. Tilak. These gentlemen are said to belong to opposite schools. Mr. Tilak is one of the orthodox, who follow the teaching of the Shastras; the Professor, as sometimes happens here with professors, is unorthodox—one of the reformers. They both, however, sank their differences on this occasion. The Professor, who is on the staff of a State-aided college, gave a lecture on the murder of Afzul, defended Shivaji, and attacked English writers for speaking of him as a rebel, and asked how, according to the European science of ethics, which had the greatest good of the greatest number as its basis, could Shivaji be condemned for abandoning a minor duty for accomplishing the major one.

'Every Hindoo,' he added, 'every Mahratta, to whatever party he may belong, must rejoice at this festival. We are all striving to regain our lost independence, and this terrible load is to be uplifted by us all in combination. It will never be proper to place obstacles in the way of any person who with a true mind follows the path of uplifting this burden in the manner he deems fit. If any one is pressing the country down from above, cut him off, but do not put impediments in the way of others.'

Mr. Tilak followed, and in the course of his address said:—

'Let us even assume that Shivaji planned and then executed the murder of Afzul Khan. Was this act of the Maharajah good or bad? The laws which bind society are for common men like yourselves and myself. Great men are above the common principles of morality. No blame attaches to any person if he is doing deeds without being actuated by a desire to reap the fruit of his deeds. With benevolent intentions Shivaji murdered Afzul Khan for the good of others. If thieves enter our houses and we have not sufficient strength in our wrists to drive them out, we should without hesitation shut them up and burn them alive. God has not conferred on the mlnchas (the generic term for a barbarian or foreigner) the grant inscribed on the copper-plate of the kingdom of Hindustan. The Maharajah strove to drive them away from the land of his birth. He did not thereby commit the sin of coveting what belonged to others. Do not circumscribe your vision like a frog in a well. Get out of the Penal Code, enter into the extremely high atmosphere of the Shrimat Bhagavatgita and then consider the actions of great men.'

This 'copper-plate-grant' theory is evidently in great favour amongst the Hindoos; as great, perhaps, as, at one time, was the *contrat social* of Rousseau amongst the French. The theory seems to be that either by original occupation or by some means (? other than forcible acquisition), some people other than ourselves have or had a quasi-divine right to possess India.

In the *Times of India* attention was drawn to the speech of Mr. Tilak, who subsequently, namely on July 22, wrote an ex-

planatory note to the effect that by the term 'mlnchas' he meant Mohammedans and not simply foreigners. This was some five or six weeks after the speech, and in the meantime Mr. Rand, the officer in charge of the plague operations at Poona, and Lieut. Ayerst, had been murdered. This crime, as we now know, had no connexion with the articles, but it may have served to stimulate the Government, and a few days after the appearance of Mr. Tilak's explanatory note, which may have been written in view of the possibility of proceedings, he and the printer of the *Kesari* were arrested and charged under the section already referred to. The exact terms of this are as follows:—

'Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life, or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

'EXPLANATION. Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause [1].'

The incriminatory articles were those of June 15, containing the poem and the speeches delivered at the festival.

After the preliminary magisterial proceedings were over, and Mr. Tilak had been liberated on bail, he and the printer were tried at Bombay before a Judge of the High Court (Mr. Justice Strachey) and a jury of nine. A verdict by a majority of two-thirds is sufficient. A European British subject when charged with a crime has a right to be tried by a European jury; a native placed in similar circumstances has no right to insist on a jury consisting wholly or partly of his own countrymen. In criminal trials the jury (subject to the privilege just referred to) are selected by ballot from a panel consisting of Europeans and natives, and the Crown and the accused respectively have an absolute right to challenge eight jurors so selected, and a further right to challenge any on special grounds. Mr. Tilak's jury was chosen in the usual way and the rights of challenge were duly exercised, with the result that the jury was ultimately composed of six Europeans and three natives (two Hindoos and a Parsee). Under these circumstances it may

[1] Cf. Arts. 96, 98, and 99 of Stephen's Digest of the Criminal Law.

not be considered surprising that he was found guilty by a majority of six to three, but it is not a necessary inference, though in this case no doubt it is true, that the majority consisted exclusively of Europeans. In the case of the editor of another journal, the *Vaibhav*, whose trial succeeded that of Mr. Tilak, the jury appear to have consisted of eight Europeans and one native, but they eventually disagreed in the proportions of five to four, and were discharged without arriving at any verdict. No inference can, therefore, be fairly drawn that the European members of a jury *de medietate linguae* will favour a conviction and the native an acquittal. [The editor of the *Vaibhav* subsequently apologized to the Government, and the prosecution was withdrawn.]

According to the account by an eye-witness, the trial, which was to be followed with interest in all parts of the world, commenced in the matter-of-fact style characteristic of English judicial functions. There was certainly some difficulty in finding seats, especially for the representatives of the vernacular press. These gentlemen assembled in considerable numbers, and on appealing to the Clerk of the Crown, that official pleasantly suggested that they should take their seats in the dock. As a forensic joke, this, it must be admitted, was far above the average.

The prosecution put in evidence the extracts already given and others from articles that had appeared in earlier issues of the *Mahratta* and *Kesari*, in order to show the animus of the accused, and in supporting the charge specially relied upon the circumstances under which Mr. Tilak had written. The Advocate-General, however, explicitly stated that he did not allege that the murders of Lieut. Ayerst and Mr. Rand had any connexion with the incriminatory articles.

The defence consisted mainly of the following contentions: The language, Marathi, in which the *Kesari* articles were written (the *Mahratta* is published in English and in Marathi), was one not known to the judge, the jury (with the probable exception of the native members), or the counsel. A translation made by the Government official interpreter was put in by the prosecution. This was said to be literal except as regards certain expressions of which a free translation was given or superadded. The translator seems to have been impressed with the necessity for care as he gave two renderings of one expression referring to this planet. The literal translation of the term was the 'terraqueous globe,' the free translation—the 'earth.' The prisoner disputed the accuracy of the translations, and when, after verdict given, asked why judgment should not be passed upon him, stated that the verdict proceeded upon a misunderstanding of certain Marathi texts, and

said that no single intelligent Mahratta gentleman had been put in the box by the prosecution. Mr. Tilak, however, gave his own version (not on oath) and did not call any other translator.

The prisoner also contended that the speech of Shivaji was but a poetical effusion referring only to his old Mohammedan foes and to past history, and having no reference to the present time. It may be remarked here, however, that one of the native judges of the High Court who made the order liberating Mr. Tilak on bail pending trial, incidentally expressed the opinion—though without entering fully into the question—that the Shivaji speech must be considered as directed not to Mohammedans but to the present Government.

It was further said that Mr. Tilak was only publishing statements the substance of which already appeared in text-books used, with or without authority, in State-aided schools, and there is no doubt that a work called 'Shivaji's Utterances' was published in 1876 and was placed in the hands of Hindoo children.

As far as the speeches at the festival were concerned, it was urged that these were merely in the nature of a discussion of scholarly questions referring to a dispute between historians as to the facts of Shivaji's career. The comments on the plague measures were defended as justifiable criticism.

The summing-up was in accord with the best traditions of the English Bench. The fairness with which the facts were handled and the law expounded was by no means the only noticeable feature in it. While we read the charge to the jury we are able to realize in some degree the sense of power with which the Hindoos credit the English. Mr. Justice Strachey is, evidently, not of the sort respecting whom Lord Justice Bowen said he felt in doubt as to whether he should be addressed as 'his learned brother or his learned sister.' As he analyzed the section and balanced one against the other the inferences which might be drawn from the poem and the speeches, under the circumstances in which they were published, it became apparent that the case was in the hands of a strong and clear-sighted judge. Justice may have her eyes bound, but she has her own X-rays which, rightly directed, render luminous obscure points round which advocates may wander as in an endless maze. We are not concerned specially to argue the question as to whether this particular conviction was right or wrong. To do that the whole of the evidence would have to be reviewed, and the task would probably be a profitless one. The principles, however, laid down by the court are of general application in India, and a reference to the summing-up may, therefore, be useful.

The judge certainly made one slip which, had it not been at once corrected, would have been serious. When drawing the jury's attention to the fact that the section did not apply to active insurrection but only prohibited the exciting or attempt to excite feelings of disaffection, Mr. Justice Strachey added that 'disaffection' meant 'simply the absence of affection.' The ignorance of our judges with regard to some mundane matters is to themselves, as we know, an ever-recurring source of pride, but when we have to deal with such an every-day subject as affection we wonder how Mr. Justice Strachey could have enunciated such a curious interpretation. When a man says he dislikes going to a dentist or dislikes going to law we know that his remark is indicative of something more than the simple absence of a liking for either of these bracing exercises. At first sight the remark would appear due to a judicial regard for precedent. This is interesting, as many people appear to think that a Code will at once abolish case-law. A good codifier will no doubt at intervals incorporate or invalidate such decisions, interpretative of the Code, as from time to time may have been pronounced by the courts, and thus the number of disputed points will be gradually reduced. They will not, however, become non-existent on the codification of the law. Section 124 A was added to the Indian Penal Code in 1870. It had once before been the subject of judicial consideration and Mr. Justice Strachey was following Sir Comer Petheram, a judge of the Calcutta Court, who in the previous prosecution under the section, had, he said, defined disaffection as 'simply the absence of affection [1].' Mr. Tilak's application for leave to petition for a new trial was largely based on this part of the summing-up, counsel contending that it amounted to a misdirection to the jury. Had it stood alone there can be little doubt that the direction would have been faulty, and this was almost admitted in the full bench of the High Court, where moreover it was stated that what Sir Comer had actually said was that 'disaffection' was the 'contrary' of affection—which is certainly nearer the truth. Mr. Justice Strachey, however, after quoting, as he supposed, from Sir Comer Petheram's judgment, immediately added:—

'Disaffection means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. Disloyalty is perhaps the best term comprehending every form of bad feeling to the Government. This is what the law means by disaffection which a man must not excite or attempt to excite. He must not

[1] [In modern usage 'affection' means active liking, or more: but it formerly might mean only a generally favourable disposition, or might be a neutral word taking its colour from the context. Compare the still current phrase 'fear, favour, affection, gain, or reward.'—Ed.]

make or attempt or try to make others feel enmity towards the Government.'

The misquotation seems, in fact, to have been simply a *lapsus linguae*, and one instantly rectified by the judge.

He then proceeded to define the term 'Government' as meaning 'the existing political system as distinguished from any particular set of administrators,' and drew the jury's attention pointedly to the difference which existed between exciting enmity against the Government as such and merely expressing disapprobation of particular measures. He added:—

'A man may criticize or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the income tax, the epidemic disease act, or any military expedition, or the suppression of the plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely and even unreasonably, perversely, and unfairly. So long as he confines himself to this he will be protected by the Explanation, but if he goes beyond this, and whether in the course of comments on measures or not holds up the Government itself to the hatred or contempt of his readers; as for instance attributing to it evil and misfortune suffered by the people or dwelling adversely upon its foreign origin and character or imputing to it base motives or accusing it of hostility or indifference to the welfare of the people; then he is guilty under the section and the Explanation will not save him.'

It was urged before the Judicial Committee of the Privy Council that Mr. Justice Strachey had put too narrow a construction upon the Explanation, but in view of the passages here cited and of others occurring in the summing-up, it is hardly a matter for surprise that the Committee declined to adopt the petitioner's contention.

The judge referred to the murders of Mr. Rand and Lieut. Ayerst on June 22, simply as indicative of the state of feeling at the time when the articles were published, but he told the jury that they must not regard this reference as a suggestion that the articles produced the murders, and he asked them to put that idea out of their minds. As we all know now, judging from the confession which has since been published, the articles had nothing to do with the murders, and in the light of this subsequent knowledge even the judge's guarded allusion to the murders was perhaps inaccurate; but with the information then available no ground for complaint can be seen in this part of the charge to the jury.

He then proceeded to analyze the incriminating articles, and dealt with the allusions to the miscarriage of justice some of which, he

said, were 'references to the unfortunate cases which as every one knows occur from time to time in which an Englishman—generally a British soldier—is tried for the murder or an assault of a native, cases in which the defence is that the whole thing was an accident and a slight blow only was intended, but owing to some disease . . . the consequences had been fatal.' One of the 'utterances' referred to a different kind of accident. Some years ago a European gentleman was out shooting, and a native woman, reported to have been employed as a beater, was while crouching amongst the bushes mistaken for a bear, fired at, and killed. The case was not brought to any kind of trial, but it would appear from the Advocate-General's opening that the European made pecuniary compensation to the relatives of the deceased woman, and his plea that the occurrence was a pure accident was accepted. Mr. Tilak contended that if a European had been shot in this way by a Hindoo the Hindoo would have been indicted for manslaughter.

The British soldier is certainly, here, exhibited in a light which does not commend him to his admirers at home, and this reference to the employment of women to beat the jungle is not pleasant reading. I have since heard, however, on good authority that in fact the woman was not so employed but was simply collecting fire-wood. Mr. Justice Strachey, of course, directed the jury, that comment upon it was perfectly permissible, but the fact that this particular case was brought in 'as one item in the general list which makes up the ruin of the country following upon the state of things Shivaji left behind him took the matter,' he thought, out of the category of simple criticism. 'Can you deal with it,' he asked, 'in the same way as if it had been the subject of a separate article, and had been written at a time when the Hindoos and natives generally were not in an inflamed and excited state? Must you not take it as forming part of the whole, and one which throws light upon the object of the writer?' The complaints relative to slaughtered kine and wrongfully imprisoned Brahmins were bracketed with a series of real or imaginary evils (otherwise disconnected), not, as far as it appeared, with a view to connected argument for redress of grievances, but for the purposes of an appeal to passion. The jury were to look at the intention in order to decide on the criminality of the prisoner, and as to this the judge, as might have been anticipated, directed them that Mr. Tilak must have been deemed to intend the ordinary and natural results of language published under the circumstances in which his articles were published, having regard to the class of people to whom they were addressed.

In this connexion Mr. Justice Strachey went back to his old

Cambridge days and to the debating society of which he was a member, and at whose meetings everything was open to question. To argue a question as to the superiority of superior persons to ordinary rules of morality in a college club was one thing: to justify political assassination in the presence of an excited mob who might be likely to try the practical efficacy of such action, was another. He reminded the jury, however, that an editor had not always time to choose his words very carefully, and with regard to the translations—which had certainly been made by a competent man—directed them to follow the free rendering save where this was disputed, in which case they should go by the literal version, adding that in deciding between doubtful readings the prisoner should have the benefit of the doubt.

The jury by the majority already mentioned convicted Mr. Tilak, and he was sentenced to eighteen months' rigorous imprisonment. The printer, who seemed to have had little responsibility, was acquitted.

After Mr. Tilak's application to the High Court had been refused some of the native papers were published with black borders. A cartoon in the *Hindi Punch* represented native journalism as a Hindoo woman bound hand and foot and with a padlock on her mouth. I question, however, if there is any great need for mourning. The judicial explanation of the Code's explanation of section 124 A may in fact serve to open the eyes of the Indian press both English and native—all are bound by the same rules—and it is apparent, as the *Times of India* has remarked, that a very wide margin is still permitted to any writer who wishes to criticize an act of the Government, even 'unreasonably, perversely, and unfairly.'

Mr. Tilak petitioned the Judicial Committee of the Privy Council for leave to appeal, and refusal of this led to some press comments here that were clever rather than well-informed or just. There seems, in fact, to be little ground for questioning any part of the proceedings unless, perhaps, that fruitful cause of criticism in criminal trials, the sentence. It should, however, be here stated that Mr. Tilak was no inexperienced hand. Ten years ago he was imprisoned for defamatory writing, and though this fact was not mentioned during the whole course of the trial—a circumstance that affords some incidental evidence as to his fair treatment—the judge may have been influenced by his knowledge of the past history of the accused.

No rational person supposes that our administration of Indian affairs—especially Indian Hospital affairs—is so perfectly wise as to place it beyond the bounds of criticism. Fair comment on any

abuse with a view to its remedy is left untouched by the Penal Code and by Mr. Justice Strachey's decision. On the other hand, the question as to whether we should place any check whatever upon the freedom of the Indian press is not an open one. A 'copper-plate-grant' of unlimited freedom to indulge in patriotic writing, such as that of the *Brooklyn Eagle*, is not likely to be conferred on the vernacular press at present—however valuable, commercially, such a 'bounty' might be to some journals. A Government, like an individual, is, under certain circumstances, entitled to protect itself against defamatory writing, though the circumstances vary as the Governments. The question is whether seditious writing, if of sufficient importance to call for any action, should be dealt with by a *Ukase*, or should be met by resort to the provisions of the Penal Code. Anglo-Indians of position are bewailing the repeal of the Vernacular Press Act, but it will probably be found that prosecutions such as that of Mr. Tilak will have a better effect upon the disloyal press than any sudden and secret process such as directed against Messrs. Natu, though the use on special occasions of process of this kind is no doubt necessary. These are old questions on which nothing new is left to be said, but they certainly cannot be settled either by lamenting the absence of a Warren Hastings or by reiterated warnings against 'driving discontent inwards.' Perhaps the warnings are due to a half-avowed opinion in favour of liberating the native press from any restriction whatever, and the laments to a half-acknowledged fear of the development of Indian intelligence. The former opinion is not likely to be realized, but we must face the facts. Indian intelligence is developing. Macaulay, who drafted the first Indian Penal Code, said he would never consent to keep the natives ignorant in order to keep them submissive, and it would appear hopeless to attempt now to reimpose the fetters that once bound the native press. If the view taken as to the effect of Mr. Tilak's conviction be correct, such an attempt would also appear needless.

All discussion as to the future government of India must turn ultimately upon the comparative merits of different systems not of Asiatic but of European rule. We certainly have little reason to fear such a discussion. The more intelligent section of the Hindoo population will probably come to the conclusion that a *régime* under which natives, foreign to ourselves and reciprocally alien, may not only rise to distinguished positions upon the judicial bench and in the civil service of the country, but may enter the Imperial Parliament and there enjoy full latitude of speech, is preferable to anything that any rival European Power could substitute.

H. C. Trapnell.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Concise Treatise on the Law of Arbitrations and Awards. Third Edition. By JOSEPH HAWORTH REDMAN. London: Butterworth & Co. 1897. 8vo. xxxvi and 438 pp. (18*s.*)

A NEW edition of any work on the subject of Arbitration and Awards was rendered imperatively necessary by the passing of the Arbitration Act, 1889, and the ever-increasing number of statutes which, like the Workmen's Compensation Act, 1897, contain new enactments for voluntary or compulsory references require that such a work should be kept well up to date.

Both the old and the new matter in the work before us have combined in producing a book of the greatest utility, not only to the profession, but also to laymen engaged in arbitrations.

The various points which crop up for consideration and decision before an arbitration begins, during its continuance, or after its close, are here adequately dealt with.

Though exhaustive in range, this work is concise in treatment, clear in arrangement, and portable in bulk. It affords a convenient but sufficient accompaniment to the busy practitioner in his journeys to the multifarious places where references are held, but libraries are often scarce and scantily furnished. The tables prefixed and matter appended leave little to be desired, and the many useful and careful precedents in App. I. will be of special service to the draftsman.

The present edition, dated Oct. 1897, appeared just too soon to incorporate the recent important decision of the Court of Appeal—in re an arbitration between Palmer & Co. and Hosken & Co., W. N., Nov. 13, 1897—which seems likely to give courts of law such control over arbitrations as they have never before exercised.

That case decided (1) that it was *misconduct* on the part of an arbitrator under sect. 11 of the Act not to give an opportunity to a party bona fide desiring it to apply to the Court for an order directing an arbitrator to state a special case; and (2) that such misconduct justifies the Court in setting aside the award and remitting the case for further consideration under sect. 10. This decision, strong as it is, appears to have been anticipated by our author on p. 162, except that he does not call in aid of it sect. 11 of the Act.

The advantage of a reference to a single arbitrator rather than to two arbitrators and an umpire (long well known to practical men) is pointed out on p. 10. The latter form of reference seems often to be stipulated for with a view rather to obstruct litigation than to settle or determine a dispute.

All the questions which most frequently exercise the minds of those whose attention is directed to this branch of law appear to us to be fully

and accurately treated, and we confidently recommend the book as an indispensable handbook to all whom arbitrations may concern.

S. H. L.

White and Tudor's Leading Cases in Equity. Seventh Edition. By Thomas Snow. London: Sweet & Maxwell, Lim. Two vols. 8vo. cxxxii and 1036, cxvi and 876 pp. (£3 15*s.*)

Leading cases are the object-lessons of law, and as such it is no wonder that they commend themselves to generation after generation of English lawyers. The human mind—the mind of Englishmen more especially—is so constituted that it rejoices in the concrete, revolts at the abstract, *totum illud displicet philosophari*, and even to the philosophers such epigrammatic novelty as the maxims of Equity once possessed when new minted from the minds of eminent chancellors has lost its original brightness—fallen into platitude; but when the abstract is embodied in the concrete, the general translated into the particular, as it is in leading cases, what a difference! The commonplaces, the dry bones of the Chancery Courts, live again and clothe themselves with the robes of reality. It affects us little to be told, for instance, as we are by the sages of Equity, that a person in a confidential relationship must not abuse his position, but when, instead of that unexceptionable truism, we have put on the stage before us the legacy-hunting clergyman, the 'spiritual medium' and the widow, or the interior of the convent with its sanctimonious tyranny, here is actuality, and our interest awakens. Or perhaps the proposition presented to us is that a tenant for life without impeachment of waste is not entitled to commit equitable waste. This is a useful generalization, but dry as remainder biscuit after a voyage, or an algebraic formula. When instead of that, or to illustrate that, we have the piquant episode—none the worse for being a family scandal—of Lord Barnard unroofing Raby Castle to spite his son we get a glimpse of human interest, and the principle is instantaneously photographed on our memories. There is, however, a worse thing than barren generalizations, and that is for the law to become, in Tennyson's words, a 'wilderness of single instances,' a 'codeless myriad of precedents.' The leading-case method steers successfully between the two dangers. Its art lies in selection, in putting into clear relief those cases which, from the simplicity of their facts, the fullness of argument, and the felicity of the judgment in form and substance, best embody and exhibit the principle which the case is chosen to illustrate. From time to time these must, of course, change with the evolution of our law—principles require to be restated. The experienced editor of the present edition, Mr. Thomas Snow, has recognized this and has, to take an instance, raised to the rank of a leading case *Burrowes* v. *Lock*, substituting it for *Savage* v. *Foster* as the leading case on equitable estoppel. He has also added to the roll the important case of *Wilson* v. *Wilson* on separation agreements between husband and wife. There are several minor improvements—the printing is no longer in double columns, the catchwords are more numerous and more clearly printed, the titles of Acts are given by reference also to their subject-matter, and an alphabetical table of contents gives coherence to the whole. Mr. Snow has, in a word, done his work well, and has given us what is, and is likely long to remain, the very best compendium of Equity and its mysteries. Of the learning condensed into these volumes some idea can be formed when we say that there are twelve thousand cases cited.

A Treatise upon the Law affecting Solicitors of the Supreme Court. With Appendices. By ARTHUR P. POLEY. London: William Clowes & Sons, Lim. lx pp. (Preface, Table of Contents, and Table of Cases) and 700 pp. (including Appendices 130 pp., and Index 53 pp.).

THIS book is an essentially practical treatise; and, having regard to its bulk as it is, we think the author has done wisely in omitting the historical side of his subject, which has already been exclusively and ably dealt with in other works, by Mr. E. B. V. Christian and others.

We have submitted the volume to searching tests on several of the topics with which it deals, and have found it, like Homer's heroes, 'good at need.' Though it can hardly be described as readable, it is a thoroughly serviceable work. It pretends to no graces of style; but there are few points on which it will be consulted, which will not be found at once lucidly, succinctly, and accurately dealt with, and references given to the latest authorities.

Indeed, the only substantial point we have been able to find upon which to break a lance with Mr. Poley is in regard to his statement of the law as follows: 'A country solicitor's certificate does not authorize him to practise in London, and practising in London with the certificate applicable to the country would render a solicitor liable to penalties' (p. 508). This is, to say the least, stated far too baldly to be regarded as correct, especially as no authorities are given; and an abortive cross-reference in a note carries us no further. The point is, what does 'practise' mean? The author nowhere refers to the guiding authority on the subject, *Re Horton* (1881), 8 Q. B. D. 434; 45 L. T. 541; the principle of which was applied in *Woodward* v. *Lowe* (1884) (unreported, but see 19 Law Jour. 324), and also quite recently, with respect to a country solicitor's right to appear as an advocate in a Metropolitan Police Court (see 42 Sol. Jour. 58; 104 Law Times, 65, 78). A more accurate statement of the existing law, so far as it has yet been determined, would appear to be that: A country solicitor is not absolutely prohibited from 'acting' or 'practising' or 'carrying on business' in London within the meaning of the Solicitors' Act, 1870, but such 'acting,' &c., must be of a casual character; and he must not habitually, or generally, 'practise' there. What 'practising or carrying on business' within the meaning of a solicitor's certificate is, is a question of fact in each particular case to be determined by a series of acts and not by isolated transactions. The maintenance of an office, or having a quasi-permanent place of business, in London, would be conclusive evidence of practising. A London solicitor, on the other hand, can practise or carry on business anywhere in England or Wales.

Our suggestions by way of addenda are few. We think Mr. Poley might have found room somewhere for reference to the view recently expressed by Mr. Justice Stirling, and apparently favoured by the Court of Appeal, that where a solicitor is consulted by a client, and consequently obtains information, from documents or otherwise, affecting the character or credit of another person, it is no part of his duty to show those documents or to give that information to the other person so affected, even though such person be a client or friend of his, *Saunders* v. *Seyd & Kelly's Credit Index Co.* (1896), 75 L. T. 193. And on pp. 127, 131, where *Regina* v. *Incorporated Law Society*, '95, 2 Q. B. 456, is cited, a reference to the further proceedings in the same case in the Court of Appeal, '96, 1 Q. B. 327, should have been given.

We have noted not a few corrigenda. *Hood Barrs* v. *Crossman & Pritchard*, '97, A. C. 172, is not mentioned, though note 1 on p. 100 bears

internal evidence that the omission is due to a clerical or typographical error; especially as the law, as laid down by the House of Lords, is incorporated in the text. On p. 360 *Irving* v. *Viana* is rightly cited as reported in 2 Younge & J. 70 (though misspelt Younger); but on p. 328, and in the Table of Cases, erroneously as 2 De G. & J. 70. On p. 372, in notes 2 and 3, there are three obvious typographical errors in two lines. On p. 359, note 3, where *Price* v. *Couch*, 60 L. J. Q. B. 770, is cited, practitioners should note that that decision was followed recently (though reported too late for inclusion by Mr. Poley) in *Re Margetson & Jones*, '97, 2 Ch. 314.

The main fault we have to find is with what we may call the machinery of the book. The Table of Contents shows that (apart from three appendices in which for convenience of reference Statutes, Rules, and Regulations are set out *in extenso*) it consists of nine books, each containing from two to seven chapters. The result is that Chaps. I, II occur no fewer than nine times, Chap. III six times, Chap. IV twice, and so on. This system is of course no new one—it is employed in many standard works, Lindley on Partnership, for instance—but, whenever it is employed, it is absolutely necessary for due facility of reference that the book and chapter shall be clearly denoted at the top or in the margin of each page; and not, as in this volume, omitted altogether, the paginal headline consisting merely of the short title of the entire work repeated from the first page to the last of the text. Further, a reference such as that which constitutes note 1 on p. 508, viz. '*Supra* Book II, Ch. 3,' without any paginal reference, drives one perforce to the Table of Contents before the required page in the text can be ascertained. Defects such as these are irritating and should be remedied in future editions.

The Table of Cases is full and informing, as references are given to several series of reports; a convenience, however, which becomes somewhat of a work of supererogation when repeated in the text. The cases throughout the volume are brought well up to date; and, although the author's Preface is dated August 9, 1897, he has managed to include some references to cases decided at least as late as the end of May. In some of the more recently decided cases which are here found cited it might perhaps have been possible to add references to what are sometimes, with more convenience than strict accuracy, called 'the authorized reports,' e. g. in *Lewis* v. *Powell* to '97, 1 Ch. 678; in *In Re Battams & Hutchinson*, to '97, 1 Ch. 699; in *In re Wood, Ex parte Fanshawe* to '97, 1 Q. B. 314; and in *Macaulay* v. *Polley* to '97, 2 Q. B. 122. But this is a small matter for complaint; and that it has been found possible to include any references at all to some of these so recently decided cases speaks well for the keen industry of the author.

It is regrettable that dates have not been appended to all the cases cited.

Before parting with the volume it may be useful to compare it briefly with the work of predecessors in the same field. During the last twenty years only two books worth mentioning have appeared upon the subject; by Mr. A. Cordery (1st ed. 1878; 2nd ed. 1888), and Mr. Archer M. White (1894), respectively. Mr. Cordery is alone in specially treating of and devoting a separate chapter to 'The Liability of Client for Acts and Defaults of Solicitor,' a highly important by-way of the main subject; and he has a useful appendix fully dealing with the 'Appointments and Offices confined to or usually held by Solicitors.' Mr. Cordery and Mr. White both deal shortly, though on the whole satisfactorily, with the criminal liability of solicitors; Mr. Poley does not touch at all upon some important aspects of the subject. On the other hand, the powers and procedure of the Statutory Committee of the Incorporated Law Society, under its inquisitorial juris-

diction conferred by the Solicitors' Act, 1888 (too late for Mr. Cordery's 2nd ed.), are more fully and usefully treated by Mr. Poley than by Mr. White. Mr. White is alone in devoting a chapter, useful on occasion, to the American law concerning legal practitioners; and in furnishing in an appendix a few Precedents. Mr. Poley deals more fully than either of his predecessors with the subject of Solicitors' Retainer and the duties, rights, and liabilities arising thereout. On the whole this volume bids fair to become the standard work on the subject.

An Introduction to the History of the Law of Real Property. By KENELM EDWARD DIGBY, assisted by WILLIAM MONTAGU HARRISON. Fifth Edition. Oxford: Clarendon Press. London: Henry Frowde and Stevens & Sons, Lim. 1897. La. 8vo. xiv and 448 pp.

MR. DIGBY'S official work naturally does not leave him overmuch time for revising new editions, and Mr. Harrison, a graduate in law and a Fellow of All Souls as well as a member of the Bar, was well chosen for the task. We think, however, that Mr. Harrison's reluctance to interfere with the text beyond evident necessity, a reluctance proper and laudable in itself, has stood in the way of thorough treatment at some points. The ghost of the 'mark system' still lingers, probably to the confusion of beginners; and generally the results of modern criticism have been added rather than worked in. Old Spelman should not miss recognition, even in an elementary book, for the true explanation of folkland which he first gave, and which Prof. Vinogradoff has restored, but which is here stated as if it were a new discovery. It might have been more explicitly noted that the impossible name 'Taltarum,' as given in the famous case of common recoveries by the printed Year Book, is now ascertained to be really Talcarn (see L. Q. R. xii. 301). An odd mistake has escaped correction in the translation of the preface or exordium to Glanvill. 'Stilo vulgari et verbis curialibus utens ex industria' does not mean 'purposely using an ordinary style and the language of everyday life' (as distinct from technical language) but 'purposely using the accustomed form and official terms of the courts' (as opposed to any inappropriate striving for elegance or classical Latinity): and so, in effect, Beames's translation gives it. 'Verba curialia' might, in another context, mean the polite language of courtiers. 'The language of everyday life' is what it cannot mean in any mediaeval context. In the glossary the relation of 'bovata' to 'carucata' should not have been left indefinite. A normal carucate is eight bovates as certainly as a normal hide is four virgates. It is still worse to give Blount's Law Dictionary as a sufficient authority on the virgate at this time of day. We do not say that these and such-like antiquarian shortcomings detract seriously from the general utility of the book. But when a book is so good and useful as a whole, it is a pity that every part of it should not be brought as near perfection as may be.

The Law of Mines, Quarries, and Minerals. By ROBERT FORSTER MACSWINNEY, assisted by LEONARD SYER BRISTOWE. Second Edition. London: Sweet & Maxwell, Lim. 1897. La. 8vo. lxxxviii and 899 pp. (40*s.*)

SINCE the publication in 1884 of the first edition of this standard work of reference both the Courts and the Legislature have been busy in dealing

with the subject-matter. Mr. MacSwinney points out, however, that the very foundation of the subject—the proper meaning of the word 'mineral'—does not appear to be definitely settled. The well-known definition of 'minerals' by Lord Justice Mellish in *Hext* v. *Gill* (1872), L. R. 7 Ch. 699, as including 'every substance which can be got from underneath the surface of the earth for the purpose of profit' has been dissented from by the House of Lords in *The Lord Provost of Glasgow* v. *Farie* (1888), 13 App. Cas. 657, on the ground that the element of profit was introduced. According to the latter case common clay, sand, and gravel forming the upper soil are not in Scotland 'minerals,' but are without apparent reason placed in a category of their own. In *Midland Railway Co.* v. *Robinson* (1889), 15 App. Cas. 19, limestone got by surface operations is in England a 'mineral,' and the author submits that, the language of the English and Scottish Waterworks Acts being substantially identical, the case of *The Lord Provost of Glasgow* v. *Farie*, although decided upon a Scots Act, must be taken as a binding decision in England as well as in Scotland, and suggests the passing of an amending Act to remedy this anomaly. It is perhaps to be regretted that 'minerals' were not defined in the Interpretation Act, 1889.

The chapter on Support in this edition has been re-cast and in part re-written. This has been rendered necessary by the numerous decisions on the subject and by a very important Act of Parliament.

The Table of Cases with references to all the Reports follows that excellent practice, hitherto very rarely adopted, of marking with an asterisk the pages of the text in which the facts of a case are stated. All the cases are noted down to the date of publication. There is an exceptionally full and well-arranged Index. Altogether the book may be confidently recommended.

The Modern Law of Real Property. By the late L. A. Goodeve. Fourth Edition. By Sir Howard Elphinstone, Bart., James W. Clark, and Arthur Dickson. London: Sweet & Maxwell, Lim. 1897. La. 8vo. xxxviii and 585 pp.

It would seem by the preface to this edition that the book now really contains more of the editors' work than of the late author's. This process, which is sooner or later inevitable in all such cases, may be matter for regret in some. In the present case the reputation of the editors for thorough mastery of the subject stands too high for any regret to be possible. One disappointment is in store for those readers who may hope to find some account or peradventure criticism of the Land Transfer Act, 1897. The Act passed on the 6th of August: the preface to this edition is dated the 1st of August, and the revision of the text was no doubt complete weeks if not months earlier. Hence there is nothing about the new Land Transfer Act. Perhaps, indeed, not much can be profitably said about it, as yet, in ordinary text-books. It is not good for students to be introduced too early to the mazes of legislation by reference. We are aware that the detestable form of this and much other modern legislation is imposed by the needs of parliamentary tactics; and, so long as vexatious obstruction is tolerated and unlearned, not to say uneducated, members of the House of Commons persist in meddling with things they do not understand, the Ministers and law officers of the Crown cannot be blamed for doing their work in a bad form rather than leave it undone. But, now that the Act is passed, we trust that an early opportunity will be taken to consolidate the Land Transfer Acts into a comparatively intelligible whole.

A new passage in this edition which will be of special interest to conveyancers is the discussion of the rule in *Shelley's* case at p. 239. The learned editors (without committing themselves as to its actual history) find its logical justification in the meaning of the word 'heirs.' The heirs of *A* are not a definite co-existing group of persons, but an indefinite number of persons who must take, if at all, in succession to one another. They cannot take as joint tenants or tenants in common, and there is no other way for them to take by purchase. Descent, therefore, is the only way in which they can take, and it must be descent from *A*. That is, limitations to *A* for life, remainders to *B*, *C*, &c. in life or in tail, remainder to the heirs of *A*, can be carried out only by treating the ultimate remainder as a remainder to *A* in fee. Nothing could be more ingenious, and the discussion in 11 Henry IV, 74 goes to show that something like this was really in the minds of fifteenth-century lawyers. They seem to have thought it impossible that a person designated only as 'right heir of *A*' should take any estate other than *A* had taken, or at least might have taken, under the same instrument.

A General View of the Law of Property. By J. Andrew Strahan, assisted by J. Sinclair Baxter. Second Edition. London: Stevens & Sons, Lim. 1897. 8vo. xxviii and 388 pp. (12*s.* 6*d.*)

It is little more than two years since we reviewed the first edition of this interesting work. The author in his preface defends himself against some of our criticisms, and retaining his opinion as to the best method of treating his subject, has in no way departed from the general plan of the first edition. We are glad to see that the text has been amplified and corrected in many of its details, and some of the omissions we called attention to have been supplied. It has been brought up to date by the inclusion of the Land Transfer Act, 1897, and several cases decided this year. The sections on *profits à prendre* and Franchises are still capable of improvement. The author seems to assert that such franchises as free fishery, rights to tolls, treasure trove, and wreck are 'rights to do something upon, or take something from, *land which belongs to another*.' Far from this being an essential characteristic of such franchises, it is by no means clear that some of them can be exercised except upon land belonging to the grantee. At any rate the instances of their being exercised upon the lands of another are comparatively rare. The whole of these sections want careful revision.

The Law of Mortgage and other Securities upon Property. By the late W. R. Fisher. Fifth Edition. By Arthur Underhill. London: Butterworth & Co. 1897. La. 8vo. cxlvi, 995 and 154 pp. (£2 12*s.* 6*d.*)

This standard work has now not only been supplemented by additional chapters treating of subjects which have become prominent only of late years, such as Debentures, but largely recast and rearranged with a view to greater convenience of reference. The value of these improvements can be fully ascertained only by continuous practical use. There is every reason, however, to expect that Mr. Underhill's own work will be found judicious and adequate. We regret to say that the table of cases, about the only part of a book of this magnitude that can be tested offhand, is neither so adequate in the way of references to all the reports as it professes to be, nor free from serious inaccuracies. For example, the important case of

Beckford v. *Wade* is indexed under 'Deckford'; *Corbett* v. *Barker* appears under 'Cobbett,' *Hartley* v. *Hitchcock* will be found both under 'Hartley' and (with a wrong reference) under 'Hurtley,' and *Mayhew* v. *Crickett* becomes *Mayhett* v. *Crickett*; two different cases of *Pitt* v. *Pitt* are lumped together; and the references to *Ireson* v. *Denn*, *Place* v. *Fagg*, *Evans* v. *Bicknell*, *Scholefield* v. *Heafield*, *Booth* v. *Cresswicke* (6 Sim. 1023, no such page and no such case in that volume), *Inglis* v. *Usherwood*, *Cockshott* v. *Bennett*, *Slubey* v. *Heyward*, *Capel* v. *Butler*, *Brewin* v. *Austin*, *Holderness* v. *Shackels*, and *Dixon* v. *Baldwen* are given with various errors in names, figures or abbreviations, of which some are large enough to be misleading.

The Principles of Pleading, Practice and Procedure in Civil Actions in the High Court of Justice. By W. Blake Odgers. Third Edition. London: Stevens & Sons, Lim. 1897. 8vo. lvi and 468 pp. (12*s.* 6*d.*)

The learned Recorder of Winchester has now extended his work on Pleading so as to make it also an elementary treatise on Procedure in general, at least in the Queen's Bench Division. In this we think he has done well, for there were full practice books for matured lawyers and meagre students' manuals for examination purposes, but, so far as we know, no working introduction on a moderate scale to the manner in which business is actually done. Mr. Blake Odgers's frequent citation of authorities from the older books as illustrations is much to be commended. All students of law should learn as soon as possible that, although the details of pleading are variable, and have not always been reasonable, the main principles remain the same under all changes of Acts and Rules.

Common Law Pleading: its history and principles. By R. Ross Perry. Boston, Mass.: Little, Brown & Co. La. 8vo. xxvi and 494 pp.

Most English lawyers will look on a new American refashioning of 'Stephen on Pleading' as they would look on one of Prof. Marsh's formidable extinct saurians. But in the United States—or some of them—the science of pleading is not yet as the deinosaur or the dodo. Mr. Ross Perry has added some useful history of courts and forms of action. We venture on a few small criticisms. Young readers should not be allowed (pp. 26, 27) to suppose that manor courts are known to be as old as the hundred court, or the county court to be older. In the statement that Anglo-Saxon courts 'were frequently held in the open air' it would be pretty safe to read 'always.' The learned author says that after the Constitution of Clarendon the ecclesiastical courts could not enforce agreements made only with pledge of faith. The precise interpretation of *Circumspecte agatis* and the Constitutions of Clarendon is not clear: but there is plenty of evidence that in fact the Courts Christian did what they are here said to have been unable to do, besides other things which they probably ought not to have done. See Harv. Law Rev. vi. 403.

An Outline of French Law as affecting British Subjects. By J. T. B. Sewell. London: Stevens & Sons, Lim. 1897. 8vo. xv and 232 pp.

The title of this little book explains its object, which is not to give a *résumé* of the whole of French law, or of its principles, but merely to collect together

the provisions of the Codes likely to affect Englishmen in France and some judicial decisions showing how in certain cases different Courts have construed them. Judgments upon points of law in France have no binding effect as precedents, and in every case the Court is supposed to go back to the original principle as laid down in the Code, though 'la jurisprudence constante' of the local court has in fact great weight. There is thus nothing in France corresponding exactly to our case-law. The reader of Mr. Sewell's book will have to bear this in mind in connexion with his numerous quotations from judgments. The matters dealt with are as follows:—The Right to Reside and Possess Property in France, French Nationality, Competence of the Courts, Intestate Succession, Testamentary Succession of Moveables, Régime Matrimonial, Marriage Settlements, Status and Capacity, Contracts, some particular forms of Contracts—Marriage and Divorce—Bills of Exchange and Promissory Notes, Torts, Bankruptcy, Execution of Foreign Judgments and Litispendence. If the work should reach a second edition we may suggest that a few corrections are needed, as at p. vi where the author speaks of 'French doctrine and jurisprudence,' evidently using these terms in their French sense (i. e. opinions of learned writers and judicial decisions), at p. vii of '*so-called* Private International Law' (an expression of controversial opinion out of place in such a work), and again on the same page of the '*correction* of . . . conflicts of law.' We have also noticed some involved statements such as on p. 121: 'a recent case has decided that the Courts would not allow the married woman who was sought to be charged to apply French law by reference to the law of domicil.'

In spite of lapses which perhaps merely show that the book has been hurriedly revised, it will be welcome to the practitioner. Not the least of its merits is that the index is exhaustive.

Encyclopaedia of the Laws of England. Edited by A. Wood Renton. Vol. IV. *County District* to *Employers and Workmen.* London: Sweet & Maxwell, Lim.; Edinburgh: W. Green & Sons. La. 8vo. viii and 488 pp. (25*s.*)

This volume contains articles on Damages, Defamation, and allied topics by Mr. Blake Odgers; on various matters of international law by Mr. T. Barclay; on colonial or quasi-colonial matters by Mr. T. Raleigh (we regret that the article 'Egypt' does not explain our very peculiar position there, for which Sir A. Milner's book should be consulted); on Court Baron and Court Leet by Mr. F. W. Maitland; on Procedure by Mr. Francis A. Stringer; on real property subjects by Mr. Cyprian Williams; on Criminal Law by Mr. W. F. Craies; and a variety of other information not easy to find elsewhere. We venture to observe that, while the principal articles are well and often extremely well done, the others do not always achieve that precision and completeness which are the crown of virtue to a great book of reference. A little more space and trouble might be given to the minor and more obscure headings, at the cost, if need be, of giving a little less to those on which good text-books are available and for which, therefore, practitioners are less likely to rely on the Encyclopaedia. Thus in the article 'Debt, Action of' an awkwardly placed sentence all but commits the learned writer (who doubtless knows better) to representing the common 'indebitatus' counts in assumpsit as belonging to the action of debt; and a novice might easily be misled. And we must except, though it is really of no importance, to the medieval history which treats that eccentric book the *Mirror* as a fair

sample of the older law books, and the modern history which supposes Macaulay's draft of the Indian Penal Code to have been later than the reports of the Criminal Law Commissioners ('Criminal Law,' pp. 37, 38).

Notes on Perusing Titles, containing observations on the points most frequently arising on a perusal of titles to real and leasehold property, with an Epitome of the notes arranged by way of reminders. By LEWIS E. EMMET. Third Edition. With an Appendix on the *Appointment of a Real Representative by the Land Transfer Act*, 1897. London: Jordan & Sons, Lim. 1897. 8vo. xliv and 376 pp.

THE first edition of this book was published in May, 1895, and the third edition is now published. This fact shows that it has supplied a want. It appears, to quote from the preface, to be limited to 'the points likely to be met with in every-day conveyancing.' The method of citing the cases referred to has some inconvenience. The author does not habitually cite from any one set of reports: he cites sometimes from one, sometimes from another, with the result that the practitioner, unless he has access to a public library, will probably not be able to read all the cases referred to. In a book of this nature it would be better either to give reference to all the reports, or if this is considered inconvenient, always to refer to the same set of reports.

Perhaps one of the most useful parts of this book, to the inexperienced practitioner at least, will be the 'Reminders,' p. 228 et seq., which contain practical hints as to the requisitions that should be made under various circumstances. We may add that we have occasionally used the book and have found it useful.

Die Gesetze der Angelsachsen. Herausgegeben im Auftrage der Savigny-Stiftung von F. LIEBERMANN. Erster Band: Text u. Übersetzung. Erste Lieferung. Halle a. S., Max Niemeyer. 1898. 4to. 191 pp.

THIS first instalment of the new standard edition of the Anglo-Saxon dooms brings us down to the laws of Eadmund. Until we have Dr. Liebermann's commentary and *apparatus criticus*, bare notice must suffice. Where there is more than one early manuscript of approximately equal authority, Dr. Liebermann has not attempted to construct a normal recension, but has printed all the texts in parallel columns. In the very first paragraph of Æthelberht's laws he has restored, from the concurrent evidence of a Cottonian MS. and a sixteenth-century transcript of the Textus Roffensis, an interesting and obviously correct original reading 'mæthlfriþ,' the place of the assembly or court (the *mallus* of the Continental *leges barbarorum*); the current reading 'mynstres-friþ' is a well-meant conjectural filling-up of the lacuna exhibited by the Textus Roffensis in its present state.

Then in the laws of Ine, § 62, we have the passage about water ordeal, which, as we mentioned on Dr. Liebermann's first publication of his discovery (L. Q. R. xii. 309), had been obscured for centuries by the misreading of one letter.

We have also received:—

The Annual Practice, 1898. By THOMAS SNOW, CHARLES BURNEY, and FRANCIS A. STRINGER. Two vols. London: Sweet & Maxwell, Lim.;

Stevens & Sons, Lim. 8vo. Vol. I, xv and 1466 pp. Vol. II, ccxlviii and 516 pp. (25*s.* net.)—In order to keep down the growing bulk of Vol. I, the editors in this issue have transferred to Vol. II, which now becomes a volume of quite respectable proportions, the tables of cases and statutes and the miscellaneous notes on Procedure and Practice (including those on Infants, Lunatics, and Married Women) hitherto printed in Vol. I. The new features include the R. S. C. under the Life Assurance (Payment into Court) Act, 1896 (Ord. LIV c), the Rules under the Judicial Trustees Act, 1896, and the Order in Council of August, 1897, relating to the circuits of the Judges. Many of the notes throughout the work have been rewritten and rearranged.

A Code of the Law of Rating and Procedure on Appeal. By SYLVAIN MAYER. London: Waterlow & Sons, Lim. 1897. La. 8vo. xxxiv and 558 pp.—Probably no branch of the law bristles with so many difficulties as the law of rating—especially in its application to the rating of railway, dock, canal, and other companies. In this work Mr. Mayer gives us the law as it at present stands in the form of a code, and so far as we have tested the book we have found it accurate and well arranged. It embodies the Agricultural Rates Act, 1896, and the Order issued under the Act, and specimens of valuations of railway, dock, gas, electric light and water companies.

Precedents of Leases, with practical notes. By JOHN ANDREWS. Third Edition. By C. DE COURCY HAMILTON. London: Reeves & Turner. 1897. Sm. 8vo. xv and 324 pp.—The 'introductory notes' in this little book contain a concise and accurate statement of that part of the law relating to leases, which is of importance to the draftsman who is settling a lease. The book contains Precedents of Leases, Assignments, Surrenders, Licences, and Notices, a short discussion on the Stamps on Leases and Assignments, the Order, under the Solicitors' Remuneration Act, as to costs, and a schedule of statutes. We consider that it will be found very useful in the ordinary practice of a solicitor's office.

The Compulsory Summons for Directions: a practical treatise on the new rules of the Supreme Court as to directions. By FRANCIS A. STRINGER. London: Sweet & Maxwell, Lim. 1897. 8vo. 30 pp. + 1 leaf.—Small as it is, this pamphlet will be welcome and important to practitioners, especially in the Queen's Bench Division. Mr. Stringer considers the probable working of the new Order XXX with a careful and experienced eye, and all his remarks deserve attention. His general conclusion is that the object of the Order is not to interfere with the general conduct of cases which are proper for pleadings, but to sift out those in which pleadings are needless, and interlocutory proceedings a mere pretence for making costs; and he thinks that, with due vigilance on the part of the Court, this end will probably be attained.

Statutes of Practical Utility passed in 1897. With notes and a summary of the Statutes selected by J. M. LELY. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1897. La. 8vo. xxi and 100 pp. (5*s.*)—This annual continuation of 'Chitty's Statutes' comprises all the Statutes of practical utility passed during 1897, arranged under subject-headings, and accompanied by a very useful summary of the general effect of each Act. Mr. Lely's annotations will save the time of those trying to arrive at the result of previous legislation on a given subject.

The Law of District and Parish Councils. By JOHN LITHIBY. Second Edition. London: Effingham Wilson and Sweet & Maxwell, Lim. 1897. 8vo. xvi and 659 pp. (15*s*)—Mr. Lithiby's book is one of the earliest of the many works called into existence by the Local Government Act, 1894. It contains the text of the Acts of 1894 and 1897, with annotations, the Local Government Board Orders issued under s. 48 of the Act, and the Board's Circulars as to Allotments, Proceedings of Parish and District Councils, the Use of Schoolrooms for meetings, and the many other details incidental to the working of the Act. Reprints are also given of other Acts connected, more or less intimately, with Local Government administration, including the Agricultural Holdings Act, 1883, the Allotments Acts 1887, 1890, the Burials Acts, 1852 to 1885, and the Public Libraries Act, 1892. There is also a useful explanatory introduction, giving a synopsis of the provisions of the Local Government Act. Recent cases appear to be duly noted, but the arrangement by which the notes are sometimes placed several pages ahead of the sections to which they refer is rather bewildering. The index contains many superfluous and unpractical headings, but does not omit the proper ones.

A Selection of Leading Cases in the Criminal Law (founded on Shirley's Leading Cases), with Notes. By HENRY WARBURTON. Second Edition. London: Stevens & Sons, Lim. 1897. 8vo. xxiv and 292 pp. (10*s*. 6*d*.)—We have already pointed out (L. Q. R. viii. 177) the cardinal defect of this work: the leading cases are not there, but only abridgments of them, without any warning to the ignorant novices who are the most likely people to use the book. For example, *R.* v. *Dudley & Stephens*, which occupies 16 pages in the Law Reports, is here accounted for by a note of a little more than a page: and the long and difficult case of *R.* v. *Ashwell* is so cut down as to become quite unintelligible.

The Assam Code: containing the Bengal Regulations, Local Acts ... &c. in force in Assam ... with chronological tables and an index. Calcutta [published by the Legislative Department of the Government of India]. La. 8vo. xx and 780 pp. (Rs. 7 or 9*s*. 6*d*.)—It is curious to find among the modern and local contents of this volume the original Bengal Regulation of 1829 'for declaring the practice of Sati or of Burning or Burying alive the widows of Hindus illegal and punishable by the Criminal Courts.' We trust there is no special necessity for its republication in Assam.

La Colpa nel Diritto Civile Odierno, 2ª Edizione interamente rifatta. Colpa Contrattuale. G. P. CHIRONI. Torino: Fratelli Bocca Editori. 1897. 1 vol. 8vo. ix and 772 pp.—This book forms part of a collection of legal works. It treats principally of the liabilities arising from breach of contract, the consequences of negligence, and the nature of damages. The subject is dealt with at great length, and many references are given to the Italian and French Codes, and to cases which have been decided on them, or rather on the general principles which have to be called in to supplement the scantily expressed provisions of the Napoleonic text.

Cuestiones de Derecho Internacional sobre la Letra de Cambio. Por J. GALLARDO. Toledo: Menor Hermanos. 1897. 8vo. 212 pp. (3 pesetas.)—In this very neatly got up little book any one who is curious about foreign laws on negotiable instruments, and can make out Spanish, may find a summary view of the principal codes and usages. We should think the book might be of considerable use to English and American

lawyers and merchants resident in Spanish-speaking countries, or otherwise having business relations with them. The only blemish we have observed is that some German citations are badly misprinted.

The Lawyer's Companion and Diary for 1898. Edited by E. Layman. London: Stevens & Sons, Lim.; Shaw & Sons. 8vo. 203 and 642 pp. (3*s.* 6*d.* to 10*s.* 6*d.*)—The fifty-second annual issue of a work scarcely needs recommendation. All information likely to be of service to lawyers seems to have been collected by the editor. In the list of Country Solicitors the name of the County Court now follows that of the town. To meet the growing bulk in other directions the lists of members of the Government and of the Houses of Lords and Commons included in former editions have been omitted in this issue. We think this is a wise discretion, the information being readily accessible elsewhere.

Sweet & Maxwell's Diary for Lawyers for 1898. Edited by Francis A. Stringer and J. Johnston. London: Sweet & Maxwell, Lim.; Manchester: Meredith, Ray, and Littler. 8vo. 422 pp. (3*s.* 6*d.* net.)—This Diary contains much information and hardly a line that is useless. Among the new features in this issue are the Rules of Descent of Intestates' Real Estates and a list of the District Official Receivers under the Companies (Winding-up) Act, 1890. The Gazetteer of towns, showing the County Court Districts and District Registries in which they are situate, is likely to be of service to both town and country solicitors.

The Lawyer's Remembrancer and Pocket Book for the Year 1898. Compiled by Arthur Powell. London: W. L. Field; and sold by the Solicitors' Law Stationery Society, Lim. 12mo. 132 pp. (2*s.* 6*d.* net.)—In the space of 6 in. by 4 in. this book gives much useful information about Stamp Duties, Trustee Investments, Costs, Proceedings by and against Partnership Firms (Ord. xlviii *a*), Appeals, Compulsory References, Originating Summonses, Summary Jurisdiction of Justices, and other things that a lawyer wants to know. There is also a list of some modern Leading Cases, and an index to Judicature Acts and Rules.

Jones' Book of Practical Forms for use in Solicitors' Offices. Vol. I. By Charles Jones. London: Effingham Wilson. 1897. 12mo. xii and 492 pp. (5*s.* net.)—This book looks as if it would be useful. Such headings as 'Letter to Client dunning for money—drawn mild' and 'Letter putting on the screw to person who has misappropriated money'—are rather surprising in a book intended for serious business purposes, but we observe nothing unusual in the forms themselves.

Lectures on the Principles of Local Government delivered at the London School of Economics. By George Laurence Gomme. Westminster: A. Constable & Co. 1897. 8vo. xv and 267 pp. (12*s.*)—This book has come to hand as we go to press. The analysis of contents looks interesting, but the subjects dealt with appear to belong to the domain of politics rather than to that of law.

Gaetano Mosca: Elementi di Scienza Politica. Roma, &c.: Fratelli Pocca. 1896. 8vo. 400 pp.—This book comes to hand as we are going to press: we are therefore unable to say at present on which side of the borderland between jurisprudence and politics it chiefly lies.

A Treatise on the Law of Collisions at Sea. By R. G. Marsden. Fourth Edition. London: Stevens & Sons, Lim. 1897. 8vo. lxxvi and 686 pp. (28*s.*).—Review will follow.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vols. XXXI and XXXII, 1826–1830. (2 & 3 Bligh (N.S.); Tamlyn; 1 R. & M.; 7, 8, & 9 B. & C.; 1, 2, & 3 M. & Ry.; 6 Bingham; 3 & 4 Moore & Payne; 2 & 3 Younge & Jervis; 2 Car. & P.; Moo. & Mal.; 7 Law Journal (O.S.).) London: Sweet & Maxwell, Lim.; Boston: Little, Brown & Co. 1897. Vol. XXXI, xv and 781 pp.; Vol. XXXII, xiv and 830 pp. (25*s.* each Vol.)

Ruling Cases. Edited by R. CAMPBELL, with American Notes by IRVING BROWNE. Vol. XII. Executor—Indemnity. London: Stevens & Sons, Lim. 1897. La. 8vo. xxxii and 845 pp. (25*s.* net.)

A Treatise on the Law of Mortgages (founded on Coote's Law of Mortgages). By L. G. GORDON ROBBINS, assisted by F. T. MAW. Two vols. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1897. La. 8vo. ccxxvii, xvi and 1759 pp. (£3.)—Review will follow.

A Compendium of the Law relating to Executors and Administrators. By W. GREGORY WALKER and EDGAR J. ELGOOD. Third Edition. By EDGAR J. ELGOOD. London: Stevens & Haynes. 1897. 8vo. lxxvii and 445 pp. (21*s.*)

A Manual of the Principles of Equity: a concise and explanatory treatise intended for the use of students and the profession. By JOHN INDERMAUR. Fourth Edition. London: Geo. Barber. 1897. 8vo. xxii and 542 pp. (18*s.*)

The Student's Guide to Real and Personal Property and Conveyancing. By JOHN INDERMAUR and CHARLES THWAITES. Fourth Edition. London: Geo. Barber. 1897. 8vo. 224 pp. (10*s.*)

The Student's Guide to the Principles of the Common Law. By JOHN INDERMAUR. Fourth Edition. London: Geo. Barber. 1897. 8vo. x and 137 pp. (5*s.*)

Simplex System of Solicitors' Book-keeping and Economic Method of Keeping Costs. By GEORGE SHEFFIELD. London: Effingham Wilson. 1897. 8vo. vi and 112 pp. (3*s.* 6*d.* net.)

Table of the Death Duties, including the new Estate Duties. By E. HARRIS. Second Edition. London: W. Clowes & Sons, Lim. 1897. (6*s.*)

Law of Rights in Security Heritable and Moveable, including Cautionary Obligations. By W. M. GLOAG and J. M. IRVINE. Edinburgh: W. Green & Sons. 1897. La. 8vo. xxxiv and 1023 pp.

A Treatise on Joint Rights and Liabilities: including those which are joint and several. By WALTER HUSSEY GRIFFITH. London: Butterworth & Co. 1897. 8vo. xx and 65 pp. (index not paged). (5*s.*)

The Trial of Lord Cochrane before Lord Ellenborough. By J. B. ATLAY. With a Preface by E. D. LAW, Commander R.N. London: Smith, Elder & Co. 1897. 8vo. xii and 529 pp. (18*s.*)

The Law of Divorce applicable to Christians in India. By H. A. B. RATTIGAN. London: Wildy & Sons; Allahabad: The 'Pioneer' Press. 1897. 8vo. xix and 460 pp. (18*s.* net.)

The Law of Master and Servant, with a chapter on Apprenticeship. By E. A. PARKYN. London: Butterworth & Co. 1897. 8vo. xxxi and 214 pp. (7*s.* 6*d.*)

Commentaries on the Law of Trusts and Trustees, as administered in England and in the United States of America. By CHARLES FISK BEACH. Two vols. London: R. James Berkinshaw. 1897. La. 8vo. ccxxxiii, xiii and 1873 pp.

Les Principes du Droit International Privé. 3 tomes. Par ALBÉRIC ROLIN. Paris: Librairie Marescq. 1897.

Histoire du droit privé de la République Athénienne. 3 tomes. Par LUDOVIC BEAUCHET. Paris: Librairie Marescq. 1897.

Les Juridictions Commerciales au moyen-âge. Par FRANÇOIS MOREL. Paris: Rousseau. 1897.

Société. État. Patrie. 2 tomes. Par P. FABREQUETTES. Paris: Librairie Marescq. 1897.

Code Civil Allemand et loi d'Introduction. Trad. par RAOUL DE LA GRASSERIE. Paris: A. Pedone. 1897.

Code Civil Allemand et loi d'Introduction. Trad. par O. DE MEULENAERE. Paris: Librairie Marescq. 1897.

Frankfurter Privatrecht. Von Dr. PAUL NEUMANN und Dr. ERNST LEVI. Frankfort: Joseph Baer. 1897.

The Law relating to Unconscionable Bargains with Money-Lenders. By HUGH H. L. BELLOT and JAMES WILLIS. London: Stevens & Haynes. 1897. 8vo. xvii and 131 pp. (7*s.* 6*d.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
